**PHARMMALAYSIA BHD**

**v.**

**DINESH KUMAR JASHBHAI NAGJIBHA PATEL & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-22-871-2001]
31 JULY 2004

***CIVIL PROCEDURE:*** *Injunction - Mareva injunction - Principles applicable - Factors to be considered - Whether there was risk of dissipation of defendants' assets - Whether plaintiff had good arguable case*

***COMPANY LAW:*** *Directors - Fiduciary duties - 1st defendant former managing director of plaintiff - Whether 1st defendant had misapplied plaintiff's funds - Whether fiduciary duty breached*

***TRUSTS:*** *Constructive trust - Monies received from funds of plaintiff - Whether defendants knowingly received such funds - Whether defendants knowingly assisted 1st defendant in breaching fiduciary duties to plaintiff - Whether defendants liable as constructive trustees*

This was an application by the plaintiff by way of summons in chambers in encl. 6 seeking an order for an injunction to be granted restraining the 1st to 14th defendants from dissipating their assets. The plaintiff carried on the business of manufacturing and distributing pharmaceutical products and was currently under receivership, and the 1st defendant was, at all material times, a director as well as the managing director of the plaintiff. The plaintiff alleged that the 1st defendant was in breach of various fiduciary duties as he had caused and procured payments to himself, the 2nd to 14th defendants and various third parties that were neither in the ordinary course of business nor referable to any legitimate purpose of the plaintiff. The plaintiff also claimed that the 2nd to 14th defendants knowingly assisted the 1st defendant in breaching his fiduciary duties to the plaintiff, or alternatively, knowingly received funds of the plaintiff which they were each aware had been paid in breach of the 1st defendant's fiduciary duties, and were accountable to the plaintiff as constructive trustees. The plaintiff's action in encl. 6 was specifically against the 2nd, 3rd, 4th, 5th, 6th, 9th and 13th defendants ('the defendants').

**Held (allowing the application):**

**[1]** The defendants were aware that the 1st defendant was the managing director of the plaintiff, and consequently, they would have, or ought to have, been aware of the fact that the 1st defendant owed certain fiduciary duties to the plaintiff. On the facts of the present case, the 1st defendant had misapplied the plaintiff's funds so that those funds would come into the hands of strangers to the trust *ie*, the defendants, who received them with the knowledge, be it actual or constructive, of that breach. The defendants became, in law, constructive trustees for the plaintiff in relation to the misapplied funds. The defendants clearly received payments without any legal basis or entitlement whatsoever; there was no legitimate commercial reason for the defendants to receive the plaintiff's funds and the payments were simply a device to transfer funds belonging to the plaintiff out of the plaintiff's accounts. The plaintiff had made out a good arguable case against the defendants, and the defendants ought to make restitution of the monies belonging to the plaintiff. (pp 498 f, 499 g-h, 507 a-b & 516 a)

**[2]** There was no dispute that the defendants received monies belonging to the plaintiff and that they were clearly in possession of assets within the jurisdiction. Furthermore, the sum total of all the evidence was that there was an inference that there was a very serious risk of dissipation of any assets that were in the hands of the defendants. This, thereby, warranted the granting of a Mareva injunction in accordance with the principles of law enunciated in the case of *Bank Bumiputera Malaysia Bhd & Anor v. Lorrain Osman & Ors*. Therefore, an order in terms as contained in paras. 8 to 18 of encl. 6 against the defendants, was granted. (pp 516 b, 551 h, 552 a & 562 b-c)

*[Ordered accordingly.]*

**Case(s) referred to:**

*Aberdeen Rail Co v. Blaikie Brothers [1843-60] All ER Rep 249* ***(foll)***
*Aberdeen Railway v. Blaikie [1854] 1 Macq HL 461* ***(refd)***
*Abrahams v. Herbert Reiach Ltd [1922] 1 KB 477* ***(refd)***
*Allen v. Jambo Holdings Ltd [1980] 2 All ER 502* ***(refd)***
*Alexander Proudfoot Productivity Services Co Singapore Pte Ltd v. Sim Hua Ngee [1993] 1 SLR 494* ***(refd)***
*American Cyanamid case [1975] 1 All ER 504* ***(refd)***
*Ang Chee Huat v. Engelbach Thomas Joseph [1995] 2 CLJ 893 CA* ***(refd)***
*A v. C (No 2) [1981] QB 961* ***(refd)***

*Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1988] 2 CLJ 377; [1987] CLJ (Rep) 50 SC* ***(refd)***
*Bain v. Fothergill [1874] LR 7 HL 158* ***(refd)***
*Banco de Portugal v. Waterlow & Sons Ltd [1932] AC 452* ***(refd)***
*Bank Bumiputra Malaysia Bhd & Anor v. Lorain Esme Osman & Ors [1987] 2 MLJ 633* ***(foll)***
*Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Osman & Ors [1985] 2 MLJ 237* ***(foll)***
*Barnes v. Andy [1874] LR 9 Ch App 244* ***(refd)***
*Bayer AG v. Winter & Ors [1986] 1 WLR 497* ***(foll)***
*Belmont Finance Corp Ltd v. Williams Furniture Ltd [1979] Ch 250* ***(refd)***
*Belmont Finance Corporation v. Williams Furniture Ltd & Ors (No 2) [1980] 1 All ER 393* ***(foll)***
*Boulting v. ACTAT [1963] 2 QB 606* ***(refd)***
*Brendon v. Spiro [1938] 1 KB 176* ***(refd)***
*British Transport Commission v. Gourley [1956] AC 185* ***(refd)***
*CAC v. Drysdale [1978] 141 CLR 236* ***(refd)***
*Chaplin v. Hicks [1911] 2 KB 786* ***(refd)***
*Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 FC* ***(refd)***
*Clackwell v. Moray [1991] 5 ACSR 255* ***(refd)***
*Eagle Trust plc v. Securities Ltd [1992] 4 All ER 488* ***(refd)***
*English v. Dedham Vale Properties Ltd [1978] 1 All ER 382* ***(refd)***
*Ferguson v. Wilson [1866] 2 Ch App 77* ***(refd)***
*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32* ***(refd)***
*France v. Gaudet [1871] LR 6 QB 199* ***(refd)***
*Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case [2001] 5 CLJ 73 HC* ***(refd)***
*George Bray v. John Rawlinson Ford [1896] AC 44* ***(foll)***
*Great Eastern Railway Co v. Turner [1872] 8 Ch App 149* ***(refd)***
*Guinness Plc v. Saunders [1990] 2 AC 663* ***(refd)***
*Hill v. CA Parsons Ltd [1972] Ch 305Ng Pak Cheong v. Global Insurance Co Sdn Bhd [1995] 1 CLJ 223 HC* ***(refd)***
*Hospital Products Ltd v. United States Surgical Corporation & Ors [1984] 55 ALR 417* ***(refd)***
*Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 81* ***(refd)***
*Hutton v. West Cork Railway Company [1883] 23 Ch D 654* ***(refd)***
*In re George Newman & Co [1895] 1 Ch 674* ***(refd)***
*In re Richmond Gate Property Co Ltd [1965] 1 WLR 336* ***(refd)***
*Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits [2001] 8 CLJ 262* ***(refd)***
*Iraqi Ministry of Defence v. Arcepey Shipping Co SA [1981] QB 65* ***(refd)***
*JJ Harrison (Properties) Ltd v. Harrison [2002] 1 BCLC 162* ***(refd)***

*Karak Rubber Co Ltd v. Burden (No 2) [1974] 1 WLR 602* ***(refd)***
*Koufos v. C. Czarnikow Ltd [1969] 1 AC 350* ***(refd)***
*Laskin v. Bache & Co Inc [1971] 23 DLR (3d) 385* ***(refd)***
*Lee Sai Poh & Ors v. Vejayakumar & Anor [1997] 3 SLR 612* ***(refd)***
*Leeds Estate, etc, Co v. Shepherd [1887] 36 Ch D 787* ***(refd)***
*Lian Keow Sdn Bhd v. Chelliah Paramjothy & Anor [1988] 1 CLJ 57; [1988] 1 CLJ (Rep) 729 HC* ***(refd)***
*Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC* ***(refd)***
*Lim Ow Goik & Anor v. Sungei Merah Bus Company Ltd [1969] 2 MLJ 101* ***(refd)***
*Livingstone v. Rawyards Coal Co [1880] 5 App Cas 25* ***(refd)***
*Low Tien Sang & Sons Holding Sdn Bhd & Ors v. How Kem Chin & Ors [2000] 2 MLJ 334* ***(refd)***
*Makepeace v. Rogers [1865] 34 LJ Ch 396* ***(refd)***
*Maris Ltd v. Mitchell 2000 GWD 16-639* ***(refd)***
*Marsh v. Joseph [1897] 1 Ch 213* ***(refd)***
*Marsh v. Lee [1670] 2 Vent 337* ***(refd)***
*Mills v. Mills [1938] 60 CLR 150* ***(refd)***
*Ministry of Health v. Simpson [1951] AC 251* ***(refd)***
*Monarch SS Co Ltd v. Karlshamns Olje fabriker AB [1949] AC 196* ***(refd)***
*Mulkana Corpn NL v. Bank of New South Wales [1983] 8 ACLR 278* ***(refd)***
*Multi-Pak Singapore Pte Ltd v. Intraco Ltd & Ors [1994] 2 SLR 282* ***(refd)***
*Nelberg v. Woking Shipping Co Ltd [1958] 2 Lloyd's Rep 560* ***(refd)***
*Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC* ***(refd)***
*Ng Pak Cheong v. Global Insurance Co Sdn Bhd [1995] 1 CLJ 223 HC* ***(foll)***
*Ngurli Ltd v. McCann [1953] 90 CLR 425* ***(refd)***
*Nippon Yusen Kaisha v. Karageorgis [1975] 3 All ER 282* ***(refd)***
*Northern Counties Securities Ltd v. Jackson & Steeple Ltd [1974] 1 WLR 1133* ***(refd)***
*Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC* ***(refd)***
*Pine Vale Investments Ltd v. McDonnell & East [1988] 6 ACLC 878* ***(refd)***
*Prince Abdul Rahman Turki Al Sudairy v. Abu-Taha [1980] 3 All ER 409* ***(refd)***
*Raja Nong Chik v. PP [1971] 1 MLJ 190* ***(refd)***
*Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [1978] QB 644* ***(refd)***
*Re A Solicitor, ex p Hales [1907] 2 KB 539* ***(refd)***
*Re Exchange Banking Co, Flitcroft's Case [1882] 21 Ch D 519* ***(refd)***
*Re Forest of Dean Coal Mining Co [1879] 10 Ch D 450* ***(refd)***
*Re Gregg, Re Prance [1869] LR 9 Eq 137* ***(refd)***
*Re Grey [1892] 2 QB 440* ***(refd)***
*Re Hilliard, ex p Smith [1845] 2 Dow & L 919* ***(refd)***
*Re International Vending Machines Pty Ltd [1962] NSWR 1408* ***(refd)***

*Re Lands Allotment Co [1894] 1 Ch 616* ***(refd)***
*Re Oxford, etc, Society [1886] 35 Ch D 502* ***(refd)***
*Re Smith & Fawcett Ltd [1942] 1 All ER 542* ***(refd)***
*Re Whitehall Court [1887] 56 LT 280* ***(refd)***
*Robinson v. Harman [1848] 1 Exch 850* ***(refd)***
*Roche v. Sherrington & Ors [1982] 2 All ER 426* ***(refd)***
*Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming [1995] 2 AC 378* ***(refd)***
*Russell v. Wakefield Waterworks Co [1875] LR 20 Eq 474* ***(refd)***
*S & F International Limited v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC* ***(refd)***
*Samuel Tak Lee v. Chou Wen Hsien [1984] 1 WLR 1202* ***(refd)***
*Selangor United Rubber Estates Ltd v. Cradock (No 2) [1968] 1 WLR 1555* ***(refd)***
*Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors [1999] 5 MLJ 421* ***(refd)***
*Sinclair v. Brougham [1914] AC 398* ***(refd)***
*Southern Foundries (1926) Ltd v. Shirlaw [1940] 2 All ER 445* ***(refd)***
*Swain & Anor v. Law Society [1981] 3 All ER 797* ***(refd)***
*Tate v. Williamson [1866] 2 Ch App 55* ***(refd)***
*Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC* ***(refd)***
*The Argentino [1888] 13 PD 191* ***(refd)***
*The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [1999] 6 MLJ 497* ***(foll)***
*The Mareva [1980] 1 All ER 213* ***(refd)***
*The Mediana [1900] AC 113* ***(refd)***
*The Venus Destiny [1980] 1 All ER 718* ***(refd)***
*Third Chandris Shipping Corporation & Ors v. Unimarine SA, The Pythia, The Angelic Wings, The Genie [1979] 2 All ER 972* ***(refd)***
*Tintin Exploration Syndicate Ltd v. Sandys [1947] 177 LT 412* ***(refd)***
*Transvaal Lands Co v. New Belgium (Transvaal) Land and Devt Co [1914] 2 Ch 488* ***(refd)***
*Twinsectra Ltd v. Yardley & Ors [2002] 2 All ER 377* ***(refd)***
*United Mining and Finance Corpn Ltd v. Becher [1910] 2 KB 296* ***(refd)***
*Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd [1949] 2 KB 528* ***(refd)***
*Wertheim v. Chicoutimi Pulp Co [1911] AC 301* ***(refd)***
*Whitehouse v. Carlton Hotel Pty Ltd [1987] 5 ACLC 421* ***(refd)***
*Woodland Development Sdn Bhd v. Chartered Bank; PJTV & Densun (M) Sdn Bhd (Third Party) [1986] 1 MLJ 84* ***(refd)***
*Woolworths Ltd v. Kelly [1991] 4 ACSR 431* ***(refd)***
*Z Ltd v. A [1982] 1 All ER 556* ***(refd)***
*Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 4(1), 132(1), 134, 135
Rules of the High Court 1980, O. 29

**Other source(s) referred to:**
Charlesworth & Cain, *Company Law*, 12th edn, p 371
Jeffrey Pinsler, *Civil Procedure*, p 135
Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution*, 5th edn, p 745
*The Concise Oxford Dictionary*, 9th edn, p 962

*For the plaintiff - Rabindra S Nathan (Nad Segaram & Mohd Izral Khairy); M/s Shearn Delamore & Co*
*For the 2nd, 3rd, 4th & 6th defendants - Jayaratnam Kumarasamy; M/s Jayaratnam & Partners*
*For the 5th defendant - George Varughese; M/s George Varughese & Co*
*For the 9th defendant - Francis Pereira; M/s Francis Pereira & Shan*
*For the 14th defendant - T Balaguru; M/s T Balaguru & Assoc*

*Reported by Suresh Nathan*

## JUDGMENT

**Abdul Malik Ishak J:**

### Introduction

This was a tussle between the plaintiff, on the one hand, and the defendants, on the other hand. The chief protagonists in regard to enclosure 6 would be the plaintiff as against the second defendant (Entigma Sdn Bhd), the third defendant (Meadow Quest Sdn Bhd), the fourth defendant (Ideaseal Trading Sdn Bhd), the fifth defendant (Isaac Alexander Lamach), the sixth defendant (Rajaram a/l Letcheminasamy), the ninth defendant (Kaladolley a/p Francis Julious Pereira) and the fourteenth defendant (Balaguru a/l Thiagarajah). One way or the other, the other defendants were also involved.

Bankruptcy proceedings had been taken out against the first defendant (Dinesh Kumar a/l Jashbhai Nagjibha Patel) in the Commercial three court *vide* D3-29-2283-2000 and although an adjudicating and receiving orders were made, the matter was still pending in the D3 court. At the time of writing this judgment, I have not been advised about the progress of the D3 matter. Be that as it may, when the case first came up before me on 12 May 2003, Mr. Mohd Izral Khairy for the plaintiff informed me that defendants' numbers one (Dinesh Kumar a/l Jashbhai Nagjibha Patel), seven (Anil Singh Gill a/l S.S.

Gill), eight (Vidhyadharan a/l A. Krishnan Kutty), ten (Jayaben Patel), eleven (Jashbhai Patel), twelve (Hemant Jashbhai Patel) and thirteen (Anparessu a/l Rajo) were absent. Mr. Mohd Izral Khairy also informed the court that the plaintiff was not proceeding against the thirteenth defendant (Anparessu a/l Rajo).

Now, the plaintiff by way of a summons in chambers in encl. 6 and pursuant to O. 29 of the Rules of the High Court 1980 ("RHC") read with the inherent jurisdiction of this court sought for the following orders:

**A. ORDER TO ALLOW ENTRY AND SEARCH OF PREMISES**

1. Each of the 1st and 5th to 14th Defendants, whether by himself, his agents, his servants, his licensees or any of them, or anyone appearing to be in control of the premises enumerated in Schedule 1 hereto ('the premises') be hereby ordered and directed to do the following:

   (a) To permit:

      (i) One (1) advocate and solicitor of the High Court of Malaya from any one of the following law firms, namely Messrs. Rashid & Lee, Messrs. Tay & Partners, Messrs. Choy & Partners, The Law Offices of David Oh and Messrs. Skrine ('the Supervising Solicitor'); and

      (ii) Not more than two (2) advocates and solicitors of the High Court of Malaya from the firm of Messrs. Shearn Delamore & Co. ('The Plaintiff's Solicitors'); and

      (iii) Up to three (3) representatives of the Plaintiff; and

      (iv) The bailiffs of this Honourable Court,

      to enter each of the Premises and any vehicles on the Premises so that they can search for, inspect, photograph or copy by xerographic or electronic digital means, and deliver into the safekeeping of the Plaintiff's Solicitors all the documents and articles which are listed or described in Schedule 2 hereto ('the Listed Items') or which the persons carrying out the Order believe to be Listed Items.

   (b) To provide all necessary consents and permissions to enable the persons referred to in paragraph 1 (a) above to enter the Premises and to give all reasonable assistance to such persons in locating and identifying the Premises and Listed Items.

(c) To allow those persons referred to in paragraph 1 (a) above:

(i) to remain on the Premises until the search is completed; and

(ii) if necessary to re-enter the Premises on the same or following day or days in order to complete the search.

(d) To immediately identify and hand over to the Plaintiff's Solicitors any of the Listed Items which are in his possession, power, custody or control.

(e) If any of the Listed Items exists or existed only in computer readable form, to immediately give the persons referred to in paragraph 1 (a) above effective access to the computers, with all necessary passwords, to enable them to be searched, and cause the Listed Items to be printed out, and a printout of the Listed Items must be given to the Plaintiff's Solicitors or displayed on the computer screen so that they can be read and copied and also to enable them to make a complete copy and/or image of the entire contents of each of the said items ('the copying process').

(f) In the event that the search of any computer and copying and/or imaging of the Listed Items is not completed on the day on which the Order is executed, to permit the Supervising Solicitor to remove the said computer for the purpose of safekeeping overnight and returning it to the Premises by 9:00 a.m. the following morning or such later time due to unforeseen circumstances which cannot be avoided.

(g) To refrain from destroying, tampering with, cancelling or parting with possession, power, custody or control of the Listed Items otherwise than in accordance with the terms of the Order.

(h) Within 24 hours to inform and to disclose to the Plaintiff's Solicitors:

(i) the whereabouts of the Listed Items; and

(ii) the full description and the nature of the Listed Items.

(i) Within seven (7) days after being served with the Order, to prepare, affirm and file an affidavit confirming the above information disclosed as required in paragraph (h) hereof and to serve a copy of the same on the Plaintiff's Solicitors.

2. Each of the 1st and 5th to 14th Defendants, whether by himself, his agents, his servants, his licensees or any of them, or anyone appearing to have control of the Premises be hereby ordered and directed to permit the persons mentioned in paragraph 1 (a) above to enter into the Premises immediately upon service of the Order on him, except as stated in paragraph 4 below.

3. No Defendant, whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever, or anyone appearing to have control at the Premises shall while the Order is being executed at the Premises, communicate with or suffer, permit or procure any person to communicate with any person save as permitted by the Order or with the express prior permission of the Supervising Solicitor.

4. Paragraphs 1 and 2 above are subject to the following restrictions:

(a) The Order may only be served between 9:00 a.m. and 6:00 p.m. on a weekday which is not a public holiday unless the Supervising Solicitor is of the view that it would be appropriate for the execution of the Order to proceed outside those hours or days.

(b) The Order may not be carried out at the same time as any search warrant.

(c) The Order must be served by the Supervising Solicitor, and paragraph 1 of the Order must be carried out in his presence and under his supervision. If the Plaintiff has grounds to believe that any of the Premises at which the Order is to be executed is likely to be in the sole occupation of a woman, and if the Supervising Solicitor is not a woman, at least one (1) of the persons accompanying the Supervising Solicitor as provided by paragraph 1 of the Order for the carrying out of the Order at those Premises shall be a woman.

(d) No Listed Items may be removed from the Premises until a list of the Listed Items to be removed has been prepared, and a copy of the list has been supplied to the person served with the Order, and the person has been given a reasonable opportunity to check the list.

(e) The Premises must not be searched, and Listed Items must not be removed from them, except in the presence of the Defendant whose name appears therein in connection with the Premises, or a person appearing to be a responsible employee of that Defendant and appearing to have authority to allow the search to proceed and to consent to the Listed Items being removed, or a person appearing to be in control of the Premises and appearing to have authority as aforesaid.

(f) If, in respect of any of the Premises, the Supervising Solicitor is satisfied that full compliance with sub-paragraph (d) or (e) above is impracticable, he may permit the search of the Premises to proceed and the Listed Items to be removed without compliance with the impracticable requirements.

5. Before permitting entry to any of the Premises by any person other than the Supervising Solicitor and the Plaintiff's Solicitors, each of the 1st and 5th to 14th Defendants or other person appearing to be in control of the Premises may seek legal advice, and apply to the Court to vary or discharge the Order, provided he does so at once. While this is being done, he may refuse entry to the Premises by any other person (other than the Supervising Solicitor and the Plaintiff's Solicitors) and may refuse to permit the search to begin for a short time (not to exceed 60 minutes, unless the Supervising Solicitor or the Plaintiff's Solicitor agree to a longer period).

6. Except for the purpose of obtaining legal advice, each of the 1st and 5th to 14th Defendants whether by himself, his agents, his servants, his licensees or any of them or otherwise howsoever must not directly or indirectly inform anyone of these proceedings or of the contents of the Order, or warn anyone that proceedings have been or may be brought against him by the Plaintiff until permitted to do so by further Order.

7. The Plaintiff, the Plaintiff's Solicitors and the Supervising Solicitor give to the Court the undertakings contained in Schedules 3, 4 and 5 hereto respectively.

**B. ORDER TO FREEZE ASSETS TO PREVENT DISSIPATION**

8. Upon the undertakings of the Plaintiff by its Counsel as set out in Schedule 6 hereto, that the 1st to 14th Defendants and each of them whether by themselves and/or their agents and/or their servants or any of them or otherwise howsoever be restrained and an injunction be granted restraining the 1st to 14th Defendants and each of them whether by themselves and/or their agents and/or their servants or any of them or otherwise howsoever from:

   (a) removing from Malaysia any of their assets whether owned legally or beneficially by the 1st to 14th Defendants and whether in the 1st to 14th Defendants' own name or not and whether solely or jointly owned up to the respective values set out against each of the 1st to 14th Defendants' names in Schedule 7 hereto; and

   (b) disposing of or dealing with or diminishing the value of any of their assets whether they in or outside Malaysia whether owned legally or beneficially by the 1st to 14th Defendants and whether in the 1st to 14th Defendants' own name or not and whether solely or jointly owned up to the respective values set out against each of the 1st to 14th Defendants' names in Schedule 7 hereto.

9. That the terms of the Order to be made hereon are not to affect or concern anyone outside of the jurisdiction of this Court until it is declared enforceable by or is enforced by a Court in the relevant country and then they are to affect him only to the extent they have been declared enforceable or have been enforced unless the person is:

   (a) a person to whom the Order is addressed or an officer or an agent appointed by power of attorney of that person; or

   (b) a person who is subject to the jurisdiction of this Court and:

      (i) has been given written notice of the Order at his residence or place of business within the jurisdiction of this Court; and

      (ii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of terms of the Order.

10. That for the purpose of securing compliance by each of the 1st to 14th Defendants with the provisions of the Order to be made hereon:

   (a) Each of the said 1st to 14th Defendants shall deliver up to the person who serves on him the Order to be made hereon all charge cards, credit cards, debit cards, automatic teller machine cards, electronic funds transfer cards, cheque books, passbooks or other payment tokens or documents howsoever described whereby a liability actual or contingent could be created by or on behalf of such Defendant or funds drawn by or on behalf of such Defendant in diminution or extinction of his assets;

   (b) Each of the 1st to 14th Defendants must separately inform the Plaintiff in writing, within 48 hours upon service of the Order, of their respective assets whether in or outside Malaysia and whether owned legally or beneficially by themselves and whether in the 1st to 14th Defendants' own name or not and whether solely or jointly owned, giving the value, location and details of all such assets;

   (c) The information referred to in sub-paragraph 10 (b) above must be subsequently confirmed in an affidavit sworn or affirmed by each of the 1st to 14th Defendants which must be served on the Plaintiff's Solicitors within 7 days after the Order to be made hereon has been served on that Defendant; and

   (d) Each of the 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Defendants shall remain within the jurisdiction of this Court until full compliance with sub-paragraphs 10 (a), (b) and (c) herein to the satisfaction of this Honourable Court and the Plaintiff, and shall, for this purpose, upon being served with the Order to be made hereon, immediately hand over to the party serving the Order on him, all

passports and travel documents of whatever description which may have been issued to him by any state or sovereign nation in his name or under any alias or alternative appellation by which he is accustomed to refer to himself provided that the said 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Defendants shall be entitled to apply to this Honourable Court on 72 hours' prior written notice to the Plaintiff's Solicitors and on sufficient grounds being shown for the re-delivery to him of any travel documentation delivered up pursuant to this provision of the Order to be made hereon.

11. That the Plaintiff shall be at liberty to use any information, documents or material obtained as a result of carrying out the Order for the purpose of these proceedings, and with leave of this Honourable Court in any other proceedings against by or any of the said 1st to 14th Defendants other than this action.

12. That provided paragraphs 10 (a), (b), (c) and (d) of the Order to be made hereon have first been fully complied with to the satisfaction of this Honourable Court and the Plaintiff, that the Order shall not prohibit:

(i) The 1st to 14th Defendants, if any of them are carrying on a business and provided that they furnish proof and full particulars of the nature of such business to the satisfaction of this Honourable Court and to the Plaintiff's solicitors, from making payments in the ordinary and proper course of business on condition that the 1st to 14th Defendants first furnish full details to this Honourable Court and to the Plaintiff's Solicitors of the source of the funds from which payments are to be made, the amounts to be paid, the intended recipients of the payments and the purpose of the payments, together with copies of all documents in support of the aforesaid details; and

(ii) each of the 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Defendants from spending RM1,000 a week towards ordinary living expenses per Defendant and also RM1,000 a week on legal advice and representation per Defendant and/or such payments in excess of such weekly limit as the Plaintiff's solicitors may agree in writing.

13. Any one or more of the 1st to 14th Defendants may agree with the Plaintiff's Solicitors that the above spending limits should be increased or that the Order should be varied in any other respect but any such agreement must be in writing.

14. That it is a contempt of Court for any persons notified of the Order knowingly to assist in or permit a breach of the Order. Any person so doing may be sent to prison or fined.

15. That the Order to be made hereon does not prevent any bank or financial institution from exercising any right of set-off it may have in respect of any facility which it gave to the 1st to 14th Defendants before it was notified of the Order provided that any funds of the particular Defendant against which a right of set-off is to be exercised by any bank or financial institution are not funds impressed with a resulting or constructive trust in favour of the Plaintiff.

16. That each of the 1st to 14th Defendants or any of them or any combination of them (or anyone notified of the Order) may jointly or separately apply to the Court to vary or discharge the order (or so much of it as affects that person), but anyone wishing to do so must give to the Plaintiff's Solicitors 48 hours' prior written notice before making any application.

17. All costs incidental to and arising out of this application be made costs in the cause.

18. Such further order or other relief as this Honourable Court deems fit.

The Schedules as alluded to in encl. 6 should be reproduced and I shall do so forthwith:

**Schedule 1**
**The Defendants and the Premises**

| Defendant | PREMISES |
|---|---|
| The First Defendant | 55-4-11, Taman Abadi Indah Apt<br>Jalan 3/109C<br>58100 Kuala Lumpur |
| The 5th Defendant | No. 74, Jalan SS2/107<br>47300 Petaling Jaya<br>Selangor |
| The 6th Defendant | 55-4-11, Taman Abadi Indah Apartment<br>Jalan 3/109C<br>58100 Kuala Lumpur |
| The 7th Defendant | 48 Jalan Tanjong<br>46000 Petaling Jaya<br>Selangor |
| The 8th Defendant | No. 53, Rawang Tin Field Camp Area<br>48000 Rawang<br>Selangor |

| | |
|---|---|
| The 9th Defendant | A-3A-5, Villa Angsana<br>Angsana Condominium<br>56 Jalan Krian, Off Jalan Batu 4<br>51100 Kuala Lumpur |
| The 10th Defendant | No. 8, Biggs Road<br>10350 Penang |
| The 11th Defendant | No. 8, Biggs Road<br>10350 Penang |
| The 12th Defendant | No. 6 Penang Street<br>P.O. Box 446<br>10200 Pulau Pinang |
| The 13th Defendant | No. 29, Kampung Muniandy<br>Bt 6 ½ Jalan Klang Lama<br>46000 Petaling Jaya<br>Selangor |
| The 14th Defendant | No. 128, Jalan Mentakab<br>Off Persiaran Titiwangsa 3<br>53200 Kuala Lumpur |

SCHEDULE 2

**The Listed Items**

1. Any and all letters, correspondences, memoranda, facsimile messages, electronic mail messages, minutes of meetings and other forms of communication or documents in permanent form regardless of medium, and all bills, accounts, invoices, ledger details and other forms of account-keeping relating to the Plaintiff's accounts and invoices rendered, received and/or produced directly or indirectly by the Plaintiff in the course of its day to day business.

2. All other information, documents and/or material, confidential or otherwise, rightfully belonging to the Plaintiff and obtained by the 1st to 14th Defendants.

SCHEDULE 3

**Undertakings given by the Plaintiff**

1. If the Court later finds that the Order has caused any loss to any of the 1st to 14th Defendants and decides that the 1st to 14th Defendants should be compensated for that loss, the Plaintiff shall comply with any order the Court may make.

2. To serve on each of the 1st to 14th Defendants at the same time as the Order is served upon him the writ and copies of the affidavits and copyable exhibits containing the evidence relied on by the Plaintiff.

3. To serve on each of the 1st to 14th Defendants a copy of the Supervising Solicitor's report on the carrying out of the Order as soon as it is received and to produce a copy of the report to the Court.

4. Not, without leave of the Court, to inform anyone other than its professional legal and other advisers of the Order or the carrying out of the Order or to use any information or documents obtained as a result of carrying out the Order or to use any information or documents obtained as a result of carrying out the Order.

5. To insure, if appropriate, the Listed Items removed from the Premises.

6. All reasonable steps shall be taken by the Plaintiff to ensure that no damage is done to any computer or data and the Plaintiff and its representatives may not themselves search the relevant Defendant's computers unless they have sufficient expertise to do so without damaging the relevant Defendant's system.

SCHEDULE 4

**Undertakings given by the Plaintiff's Solicitors**

1. To answer at once to the best of their ability any question whether a particular item is a Listed Item.

2. To retain in their own safe-keeping all other Listed Items obtained as a result of the Order until the Court directs otherwise.

3. To execute the Order calmly and orderly and in a manner respectful of each Defendant's business or place of domicile.

4. Not, without leave of Court, to inform anyone other than the Plaintiff's professional legal and other advisers of the Order or the carrying out of the Order as a result of carrying out the Order except for the purposes of these proceedings.

SCHEDULE 5

**Undertakings given by the Supervising Solicitor**

1. To offer to explain to the person served with the Order its meaning and effect fairly and in everyday language, and to inform him of his right to seek legal advice and apply to vary or discharge the Order.

2. To make and provide the Plaintiff's Solicitors a written report on the carrying out of the Order.

SCHEDULE 6

**Undertakings given by the Plaintiff**

1. To abide by any order that this Honourable Court and Judge may make as to damages in case that the Court or a judge should hereafter be of the opinion that the Defendants or any of them shall have sustained any damages by reason of this order which the Plaintiff ought to pay;

2. To inform the Defendants forthwith of the terms of this order and to serve upon them and their solicitors a copy of the affidavit(s) as sworn and of the exhibits thereto together with a copy of this order;

3. To pay the reasonable costs, charges and the expenses of any person or body other than the Defendants who will have been given or served with notice of this order in ascertaining whether or not any assets that are the subject of this order are within his or their possession or control or otherwise incurred by him or them in complying with the terms of this order;

4. To indemnify any person or body other than the Defendants to whom notice of this order is given against any loss, damage or liability sustained or incurred by him or them in complying with or implementing this order;

5. To notify the Defendants and their solicitors and any person or body upon whom or to whom notice of this order is served or given at the time of service of his right, if so advised, to apply on notice to discharge or vary this order.

SCHEDULE 7

**Proposed Limits**

| Parties | Proposed limits | |
|---|---|---|
| (a) 1st Defendant | RM19,120,248.09 | |
| (b) 2nd Defendant | RM 5,399,100.00 | |
| (c) 3rd Defendant | RM 8,218,000.00 | |
| (d) 4th Defendant | RM 600,000.00 | |
| (e) 5th Defendant | RM 875,195.20 | |
| (f) 6th Defendant | RM 144,000.00 | |
| (g) 7th Defendant | RM 50,000.00 | |
| (h) 8th Defendant | RM 349,018.75 | |
| (i) 9th Defendant | RM 40,000.00 | |
| (j) 10th Defendant | RM 572,343.83 | ) Joint and |
| (k) 11th Defendant | RM 572,343.83 | ) several |
| (l) 12th Defendant | RM 639,471.20 | |
| (m) 13th Defendant | RM 15,000.00 | |
| (n) 14th Defendant | RM 150,000.00. | |

The grounds in support of the plaintiff's application can be seen in the affidavit of Kenneth Teh Ah Kiam that was affirmed on 26 June 2001 and briefly the grounds may be stated as follows:

(a) The 1st Defendant in breach of his fiduciary duties, had caused and procured payments to *inter alia* to himself, the 2nd to 14th Defendants and various third parties that were neither in the ordinary course of business of the Plaintiff nor referable to any legitimate purpose of the Plaintiff.

(b) The 2nd to 14th Defendants knowingly assisted the 1st defendant in breaching his fiduciary duties to the Plaintiff, or alternatively knowingly received funds of the Plaintiff which they were each aware had been paid in breach of the 1st Defendant's fiduciary duties and are accountable to the Plaintiff as constructive trustees.

(c) The Plaintiff believes that the 1st and 5th to 14th Defendants have in their possession material or documents that would aid the Plaintiff to prove its case and obtain further claims against the 1st Defendant.

(d) The manner in which the payments were made, the manner in which accounting records of the Plaintiff did not reflect the true purpose of such payments and the commercially deceptive practices outlined in the affidavit in support by all the said 1st to 14th Defendants when taken in totality together with the other facts and circumstances described therein justify the inference that:

(i) refusal of Anton Pillar relief would give rise to a real risk that the 1st and 5th to 14th Defendants may destroy or dispose off such material before an inter partes application can be made; and

(ii) refusal of mareva injunctive relief would give rise to a real risk that any judgment in favour of the Plaintiff would remain unsatisfied because the 1st to 14th Defendants may take steps to dissipate their assets and the 1st and 5th to 14th Defendants may flee the jurisdiction before the Plaintiff's claim can be adjudicated on the merits.

The plaintiff carries on the business of manufacturing and distributing pharmaceutical products and currently it is under receivership pursuant to the debentures dated 16 August 1995, 10 December 1995 and 25 February 1997 (hereinafter referred to as the "debentures"). And those debentures were created in favour of Perwira Affin Bank Bhd. The debentures and a copy of the notice of appointment of receivers and managers dated 14 September 1998 can be seen in exhs. "KT1" and "KT2" of encl. 7.

The first defendant was, at all material times, a director as well as the managing director of the plaintiff. The second to the twelve defendants' connections to the first defendant and with each other together with the roles of three companies are amply set out at para. 11 of the amended statement of claim as seen in encl. 13 and, for convenience, I will reproduce that para. 11 forthwith:

**The Claim against the 2nd to 12th Defendants**

11. In so far as the payments referred to in paragraph 9 (b) herein, such payments were made to or for the benefit of the 2nd to 14th Defendants. At all material times, the said 2nd to 12th Defendants had the direct or indirect business, family and/or personal links or connections to the 1st Defendant through the various legal entities and/or natural persons described below.

**PARTICULARS**

11.1 **The 2nd Defendant**

(i) Jacqueline Mary Rowley ('Jacqueline'), the 6th Defendant, the 8th Defendant and the 9th Defendant were shareholders in the 2nd Defendant. Collectively, they held 90% of the issued share capital.

(ii) The 6th Defendant and Jacqueline were the two directors of the 2nd Defendant.

(iii) The 1st Defendant, the 6th Defendant, the 8th Defendant and Jacqueline were also directors of a company known as Star Impetus Sdn Bhd ('Star Impetus').

(iv) The 2nd Defendant was ostensibly recorded as the named payee in the accounting records of the Plaintiff of some of the cheques referred to in Appendices 1, 2 and 3 hereto but such cheques were in actual fact paid to or for the benefit of the 1st Defendant.

(v) The 2nd Defendant was also ostensibly recorded as the named payee in the accounting records of the Plaintiff of some of the cheques referred to in Appendices 7, 9, 11 and 12 but such cheques were in actual fact paid to or for the benefit of the 2nd to 14th Defendants.

11.2 **The 3rd Defendant**

(i) The 1st Defendant and the 8th Defendant were shareholders of the 3rd Defendant.

(ii) The 6th Defendant and the 8th Defendant were directors of the 3rd Defendant.

(iii) Although the 3rd Defendant was ostensibly recorded as the named payee stated in the accounting records of the Plaintiff of some of the payments in Appendices 7 and 12 hereto, such payments were in actual fact made to or for the benefit of the 2nd to 14th Defendants.

11.3 **The 4th Defendant**

(i) The 6th Defendant and the 8th Defendant were fellow directors of the 4th Defendant.

(ii) The 8th Defendant was a fellow shareholder with the 1st Defendant in the 3rd Defendant.

(iii) The 6th Defendant and the 8th Defendant were fellow directors with the 1st Defendant at Star Impetus.

(iv) One of the payments listed in Appendix 9 hereto was recorded as ostensibly made to the 2nd Defendant but it was in actual fact made to the 4th Defendant.

11.4 **Pharmtrade Sdn Bhd**

(i) Pharmtrade Sdn Bhd ('Pharmtrade') is a company incorporated in Malaysia. It is not a recipient of payments referred to in paragraph 9. However, it is an entity through which links between some of the defendants can be established.

(ii) The 5th Defendant and one Upendra Patel a/l Chihanbhai Patel ('Upendra Patel') are the directors of Pharmtrade.

(iii) The 5th Defendant and Upendra Patel were also directors of the Plaintiff, together with the 1st Defendant.

(iv) Patel & Sons Sdn Bhd ('Patel & Sons) owned almost 100% of Pharmtrade.

(v) Both the 1st Defendant and Upendra Patel wee directors of Patel & Sons.

(vi) The 1st Defendant owns 25% of Patel & Sons.

(vii) Pharmtrade was ostensibly the named payee in the accounting records of the Plaintiff of some of the cheque payments listed in Appendices 1, 2, 3 and 6 hereto, but such payments were in actual fact made to or for the benefit of the 1st Defendant.

(viii) Pharmtrade was ostensibly the named payee in the accounting records of the Plaintiff of some of the cheque payments listed in Appendices 7, 8, 10, 11 and 13 hereto but such payments were in actual fact made to or for the benefit of the 2nd to 14th Defendants.

11.5 **Symmetry Point Sdn Bhd**

(i) Symmetry Point Sdn Bhd ('Symmetry Point') is a company incorporated in Malaysia. It is not a recipient of payments referred to in paragraph 9. However, it is an entity through which links between some of the defendants can be established.

(ii) Symmetry Point shares the same registered address as the 2nd and 3rd Defendants.

(iii) The 6th Defendant and Jacqueline were the two directors of Symmetry Point.

(iv) The 6th Defendant, the 7th Defendant and Jacqueline collectively owned 100% of Symmetry Point.

11.6 **Star Impetus Sdn Bhd**

(i) Star Impetus Sdn Bhd ('Star Impetus') is a company incorporated in Malaysia. It was a recipient of one payment of RM5,000 that was in fact recorded in the accounting records of the Plaintiff as having been made to the 2nd Defendant. In addition, it is an entity through which links between some of the defendants can be established.

(ii) Star Impetus shares the same registered address as the 2nd and 3rd Defendants.

(iii) The 1st Defendant, the 6th Defendant, the 8th Defendant and Jacqueline were directors of Star Impetus.

(iv) The 6th Defendant, the 7th Defendant, the 8th Defendant and Jacqueline collectively held 90% of the issued share capital of Star Impetus.

11.7 **The 5th, 6th, 7th and 8th Defendants**

The direct or indirect business or other links and connections of the 5th, 6th, 7th and 8th Defendants to the 1st Defendant have been set out in the preceding sub-paragraph of paragraph 11 herein and the Plaintiff repeats the same.

11.8 **The 9th Defendant**

The 9th Defendant was an employee of the Plaintiff holding the post of Finance and Administrative Manager, and assisted the 1st Defendant in managing the financial affairs of the Plaintiff. The 9th Defendant was the co-signatory, together with the 1st Defendant, of all the cheque payments referred to in paragraph 9 above.

11.9 **The 10th, 11th and 12th Defendants**

(i) The 10th Defendant is the mother of the 1st Defendant.

(ii) The 11th Defendant is the father of the 1st Defendant.

(iii) The 12th Defendant is the elder brother of the 1st Defendant.

It would not be out of place to refer to para. 9 of the amended statement of claim in encl. 13 and the Appendixes thereto. I shall reproduce that para. 9 of the amended statement of claim forthwith:

9. In breach of his fiduciary duties referred to in paragraph 7 and/or in breach of the duties referred to in paragraph 8, the 1st Defendant caused, permitted or procured the Plaintiff to effect various payments to himself and to the 2nd to 14th Defendants amounting to (subject to revision following discovery of documents and/or the administering of interrogatories) RM19,120,248.09.

(a) Details of the payments made to or for the personal benefit of the 1st Defendant are particularised in Appendixes 1 to 6 hereto.

(b) Details of payments made or for the benefit of, as the case may be, the 2nd to 14th Defendants are particularised in Appendixes 7 to 13 hereto.

I will now proceed to the heart of the matter under different sub-heads.

*[Appendixes 1-13, which were in contained the original judgment, are not included in this report.]*

**The Plaintiff's Case Against The First Defendant (Dinesh Kumar a/l Jashbhai Nagjibha Patel)**

The plaintiff's cause of action against the first defendant was for breach of various fiduciary duties owed by the first defendant to the plaintiff as the director and managing director of the plaintiff. These varied duties have been set out in paras 9 and 10 of the affidavit of Kenneth Teh Ah Kiam that was affirmed on 26 June 2001 as seen in encl. 7 and I need to reproduce them here:

9. The R&M were advised by the Plaintiff's solicitors, which advice I verily believe to be true, that by virtue of the 1st Defendant's appointment and tenure as director and as Managing Director of the Plaintiff, the 1st Defendant owed the Plaintiff fiduciary duties which included, *inter alia*, the following duties:

(a) a duty to act *bona fide* in the interest of the Plaintiff in the discharge of all duties, powers, responsibilities, obligations and functions assigned to or vested in or attached to him as director of the Plaintiff; and/or

(b) a duty to exercise his powers as a director and as the Managing Director of the Plaintiff and to act for the proper purposes of the Plaintiff in relation to its affairs; and/or

(c) a duty to serve the Plaintiff faithfully and dutifully and not to advance or promote his own or other external interests to the prejudice of or contrary to or in conflict with the interest of the Plaintiff; and/or

(d) a duty to ensure that contracts and transactions are entered into at arm's length in fulfillment of the corporate objectives of the Plaintiff to maximise profits and to advance and promote the business of the Plaintiff; and/or

(e) a duty not to place or allow himself to be placed in a situation or position whereby any of his duties and obligations to the Plaintiff conflict or may conflict with his own personal interests.

10. The R&M are further advised by the solicitors acting for the Plaintiff, which advice I verily believe to be true, that in addition to the 1st Defendant's fiduciary duties referred to above, as a director and as the Managing Director of the Plaintiff, the 1st Defendant:

(a) owed trustee-like obligations to the Plaintiff in respect of the assets of the Plaintiff; and

(b) was under a duty, both under section 132(1) of the Companies Act 1965 (Act 125, Malaysia) ('the Companies Act') and under the common law, to act honestly and to exercise reasonable skill and care in the conduct of the affairs of the Plaintiff; and

(c) was under a duty pursuant to section 167 of the Companies Act to ensure that proper accounting records were maintained in respect of the financial affairs of the Plaintiff and that such records gave a true picture of the actual nature of all transactions which had taken place involving the Plaintiff.

It was the stand of the plaintiff that in breach of these duties, the first defendant made substantial payments to himself, to third parties and to the 2nd right up to the 14th defendants. These payments may be listed as follows:

(a) payments totalling RM2,068,119.11 paid to the 1st defendant or to third parties on his account or for his own benefit (see para. 11(a) and exh. "KT4" of encl. 7);

(b) payments totalling RM17,052,128.98 paid to the 2nd right up to the 14th defendants as particularised in para. 11(b) of encl. 7 and the details of these payments and the relevant supporting documentation evidencing the same can be seen in exh. "KT5" of encl. 7; and the sums received by the 2nd to the 6th defendants, as well as the 9th and 14th defendants may be listed and categorised as follows:

(i) the 2nd defendant at RM5,339,100 as per encl. 7 of exh. "KT5" at p. 298;

(ii) the 3rd defendant at RM8,218,000 as per encl. 7 of exh. "KT5" at p. 326;

(iii) the 4th defendant at RM600,000 as per encl. 7 of exh. "KT5" at p. 336;

(iv) the 5th defendant at RM875,195.20 as per encl. 7 of exh. "KT5" at p. 338;

(v) the 6th defendant at RM144,000 as per encl. 7 of exh. "KT5" at p. 350;

(vi) the 9th defendant at RM40,000 as per encl. 7 of exh. "KT5" at p. 358; and

(vii) the 14th defendant at RM150,000 as per encl. 7 of exh. "KT5" at p. 373 (the figure should be RM200,000 and this will be elaborated towards the end of this judgment).

That the abovenamed defendants received the above sums of moneys can never be doubted. It was the stand of the plaintiff that the 2nd to the 6th defendants, the 9th defendant and the 14th defendant were all liable in law to return the sums received from the plaintiff. These defendants were said not to have any basis in law whatsoever to receive or retain those sums of moneys. It will be observed that all these payments were made not in the ordinary course of business nor were they made for the legitimate purposes of the plaintiff. Indeed such payments were part and parcel of a well devised and calculated scheme to bleed the plaintiff of its funds. In support of the plaintiff's claim against the 1st defendant for breach of fiduciary duties which the 1st defendant owed to the plaintiff as a director, several authorities must be referred to. For starters, I shall refer to the case of *Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman, Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman & Ors.* [1987] 2 MLJ 633 where Zakaria Yatim J (as he then was) said at p. 637 of the report:

The first case is *Regal (Hastings) Ltd. v. Gulliver and Others* [1942] 1 All ER 378. This is a House of Lords case. In his judgment at page 381, Viscount Sankey said:

> As to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial judge. In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interest of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust.*

In the same case, Lord Russell stated at page 386:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

This would be followed by the case of *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* [1999] 6 MLJ 497. There Ian Chin J said at p. 533 of the report:

> In *Re The French Protestant Hospital* [1951] 1 Ch 567 it was held that as: (a) the directors, though not technically trustees, were in the same fiduciary position as trustees in respect of the affairs of the corporation; and as (b) they were accordingly debarred by the rule of law relating to trustees from receiving payment for their services, it was improper for them of their own motion to introduce a by-law of the kind proposed, and that such a by-law was *prima facie* 'repugnant to law'.

And finally it would be the case of *Ng Pak Cheong v. Global Insurance Co Sdn Bhd* [1995] 1 CLJ 223 where Mohamed Dzaiddin J at p. 232 to p. 233 said:

> It must be remembered that at all material times, the deceased was the chairman of the defendant and some of his Ng family members were directors. The deceased was also the principal officer of the defendant. In law, the deceased and other directors of the defendant owe a fiduciary duty to the defendant and its shareholders and they are expected to exercise their powers and discretion

for the benefit of the company at all times. In *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134 at p 137 G; [1942] 1 All ER 378 at p 381, Viscount Sankey stated:

> The general rule of equity is that no one who had duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.

In *Australian Growth Resources Corp Pty Ltd v. Van Reesema* [1988] 13 ACLR 261, it was observed (at p. 268):

> The relationship of a director to the company is fiduciary in character. The primary consequence of this principle is that a director is bound to exercise the powers and discretions conferred upon him *bona fide* in the interest of and for the benefit of the company as a whole. The exercise of a fiduciary power for a purpose beyond the legitimate scope of the power is invalid. The validity of the exercise of the powers of a director therefore depends upon the purpose of the exercise being for the benefit of the company as a whole.

On the law of directors who appropriate for themselves the business or property of the company, the Privy Council in *Cook v. Deeks* [1916] 1 AC 554, per Lord Buckmaster LC (at p. 563), observed as follows:

> But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

His Lordship further added (at p 564):

> In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts …

Therefore, applying the above principles to the facts of this case, I am of the view that the deceased was in breach of his fiduciary duties as a director of the defendant whereby, with the connivance of the Ng family directors and the Siang Yong directors, he used the said agreement as a scheme or device to appropriate the assets of the defendant company to himself and for his own benefit.

Now, it must be recalled that the first defendant held two positions in the plaintiff's company: as a director as well as a managing director. Generally, a director is defined as a member of a board managing the affairs of a company. Section 4(1) of the Companies Act 1965 defines the word "director" to include:

> any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternative or substitute director.

Directors hold onerous posts in the company. The director may be removed from office in accordance with the articles of association. But if a director is removed from office in breach of his contract, he may sue for damages (*Southern Foundries (1926) Ltd v. Shirlaw* [1940] 2 All ER 445; and *Alexander Proudfoot Productivity Services Co Singapore Pte Ltd v. Sim Hua Ngee* [1993] 1 SLR 494). Once removed a director cannot insist on remaining as a director and the court will not enforce a contract requiring the company to retain that director (*Hill v. CA Parsons Ltd* [1972] Ch 305, 321-322). It is interesting to refer to the case of *CAC v. Drysdale* [1978] 141 CLR 236. In that case, Drysdale was a director of CAC but his appointment expired and he was not reappointed. However, he continued to act as a director. The court held that Drysdale was still a director because he continued to take part in the management of the company. The court too held that Drysdale was still subject to the statutory and fiduciary duties imposed on directors.

A managing director is the person appointed from amongst the company's directors to manage the affairs of the company. Managing directors are nothing more than employees of the company. It is said that an appointment of a managing director facilitates good company management because it is inefficient to convene a meeting of the board in order to make every management decision. The managing directors too are subject to and must adhere to the statutory and fiduciary duties imposed on them.

Section 134 of the Companies Act 1965 empowers a company to keep a register in respect of each of its directors containing particulars relating to the director's shares, debentures, participatory interests, rights or options and also any contract to which the director concerned is a party. The director's shares in a wholly-owed subsidiary of the company or of another company is also required to be entered in the register. Section 134 of the Companies Act 1965 also provides for the manner in which the register is to be maintained and any non-compliance with s. 134 of the said Act would constitute an offence and the defaulting company and every officer who defaults will be guilty of an offence punishable with imprisonment for three years or fifteen thousand ringgit fine.

Then there is s. 135 of the Companies Act 1965. That section imposes a duty on a director to disclose all his interests as may be required in order to maintain the register under s. 134 of the Companies Act 1965. A director who commits default or fails to comply with s. 135 of the same Act will be guilty of an offence punishable with imprisonment for three years or a fine in the sum of fifteen thousand ringgit. It is also ideal to state that s. 135 of the Companies Act 1965 sets out the manner in which a director is to disclose his interests to enable it to be entered in the register. Two cases must be highlighted. Firstly, it is the case of *Raja Nong Chik v. PP* [1971] 1 MLJ 190. There the company knew that the director dabbled in share transactions and the company had resolved to approve registration in the director's name. The court held that s. 135 of the Companies Act 1965 is principally directed against directors who buy or sell shares without the company's knowledge. In sentencing the director who had pleaded guilty, the court took into consideration that the board knew that the director had dabbled in share transactions as a mitigating factor.

Secondly, it would be the case of *Woolworths Ltd v. Kelly* [1991] 4 ACSR 431, where by a majority the Court of Appeal of New South Wales held that disclosure was necessary under s. 131 where the nature of the interest was known to the other directors. At p. 443 of the report, Samuels JA aptly said:

> I cannot think that equity requires a ritual of formalities in which the fiduciary must ceremonially confess his sin in order to be able to receive absolution.

As a director of the plaintiff's company the first defendant must surely be held to be an agent of that company. This is trite law. Cairns LJ in *Ferguson v. Wilson* [1866] 2 Ch App 77, aptly said:

> What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent.

Lord Selborne LC in *Great Eastern Railway Co v. Turner* [1872] 8 Ch App 149, succinctly said:

> The directors are the mere trustees or agents of the company – trustees of the company's money and property – agents in the transactions which they enter into on behalf of the company.

Walton J in *Northern Counties Securities Ltd v. Jackson & Steeple Ltd* [1974] 1 WLR 1133, rightly said that:

> ... a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors.

All these legal semantics would show the duties of the first defendant in his positions as the director and managing director of the plaintiff's company.

I will now say something about fiduciary relationship.

It is recognised that a fiduciary is a person who occupies a position of trust in relation to another. Directors are in a fiduciary relationship to their company. The law requires that directors must act in good faith and in the company's interests and they too must exercise their powers exclusively for the benefit of the company. These duties are aimed at protecting the company from the harm that may arise if directors are tempted to use their position for their own personal advantage.

In England, the Court of Chancery has painstakingly developed the principles of equity. The Lord Chancellor was referred to as "the Keeper of the King's conscience." The principles were phrased and framed and based on conscience – requiring "that to be done which ought to be done". Equity has developed the duties for directors to adhere to. It is called fiduciary duties. So, every company director now has a duty to:

(i) act in a *bona fide* manner (ie, acting honestly) in the interests of the company;

(ii) exercise the company's powers for a proper purpose;

(iii) retain their discretion and not be bound in advance to act in a certain way; and

(iv) avoid a situation of conflict between their duties to the company and their own interests.

Flowing from all these, it can be readily surmised that every director has a duty to exercise reasonable care and skill in managing the company's business. In *Re Smith & Fawcett Ltd* [1942] 1 All ER 542, Lord Greene MR categorically stated that directors must "exercise their discretion bona fide in what they consider – not what the court may consider – to be in the interest of the company, and not for any collateral purpose". In *Mills v. Mills* [1938] 60 CLR 150, the court there held that in equity directors have a duty to exercise their powers for proper corporate purposes. In that case, Dixon J stated that the directors of a company are fiduciary agents and that a power exercised by them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power.

The courts will usually ask the pertinent question, "But for the improper purpose, would the directors have exercised their powers that way?" The best "but for" test was first stated in *Whitehouse v. Carlton Hotel Pty Ltd* [1987] 5 ACLC 421. That was an interesting case. There, the permanent governing

director of a company issued voting shares to his sons to prevent his daughters (who had sided with their mother after their parents' divorce) from gaining voting control of the company after his death. The High Court held that the new shares had been issued for an impermissible purpose, that was, to manipulate the voting structure of the company. The court further held by a majority that "regardless of whether the impermissible purpose was the dominant one, or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, the power would not have been exercised".

The following three authorities would illustrate the situations where the directors have breached their duties to act for proper purposes.

In *Ngurli Ltd v. McCann* [1953] 90 CLR 425, a director was the beneficial owner of the one share out of sixty-one which entitled him (but only temporarily) to control the company. That director further caused shares to be issued, to which he would be beneficially entitled to continue his control over the company. The court held that the issue of those shares to be invalid because the director's real purpose was to benefit himself.

In *Pine Vale Investments Ltd v. McDonnell & East* [1988] 6 ACLC 878, a rights issue of shares was made to acquire another company, but the new shares effectively frustrated a bid for control of the issuing company. The court held that since the acquisition was commercially favourable and a rights issue was appropriate to finance it, the issue was valid despite any other improper motive.

In *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 81, a joint bidder had acquired a majority of shares. Before the bidder could use the new voting power the board resolved to issue sufficient shares to a rival bidder to put the joint bidders into a minority, thereby assisting the rival bid. The court rejected the directors' evidence that the share issue had been made just to raise capital. The court further held that the issue of those shares was void as an improper exercise of their powers even though the court accepted that they had acted in good faith.

Section 132(1) of the Companies Act 1965, in a nutshell, requires a director "to act honestly and use reasonable diligence in the discharge of the duties of his office." As an officer of the company, the director is barred from making improper use of any information acquired by virtue of his position in the company in order to gain directly or indirectly any advantage for himself or for any other person or cause detriment to the company. What is required of a director to do under this provision of the law is in addition to and not

in derogation of any written law or rule of law relating to the duty or liability of directors or officers of a company. It is a correct statement of the law to say and I so say that directors owe fiduciary duties and certain duties of care to the company (*Low Tien Sang & Sons Holding Sdn. Bhd. & Ors. v. How Kem Chin & Ors.* [2000] 2 MLJ 334). The directors are obliged, by virtue of their position, to exercise their fiduciary power in the interest of the company in which they serve (*Samuel Tak Lee v. Chou Wen Hsien* [1984] 1 WLR 1202; *Woodland Development Sdn. Bhd. v. Chartered Bank; PJTV & Densun (M) Sdn. Bhd. (Third Party)* [1986] 1 MLJ 84; and *Teoh Peng Phe v. Wan & Co.* [2001] 5 CLJ 222). It goes without saying that the directors are, by virtue of their position, in a fiduciary position towards the company in general and the shareholders in particular (*Lim Ow Goik & Anor v. Sungei Merah Bus Company Ltd.* [1969] 2 MLJ 101). At all times, the directors must act civilly and they are expected to exercise their vast powers and discretions for the benefit of the company (*Ng Pak Cheong v. Global Insurance Co. Sdn. Bhd.* [1995] 1 CLJ 223). The law is simply this:

(1) that the director holds a fiduciary position in the company;

(2) and he must exercise the powers vested in him as a director in the interests of the company;

(3) and he must not exercise those powers as a director against the interests of the company; and

(4) in exercising those powers by virtue of his position as a director he must always do so for the general interests of the company and nothing else.

The scope and range of cases where a fiduciary duty has been held to exist are far and wide. They cannot be itemised with ease and they remain open for future judges to explore and deliberate (*Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd*. [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; *English v. Dedham Vale Properties Ltd.* [1978] 1 All ER 382, [1978] 1 WLR 93; *Laskin v. Bache & Co. Inc* [1971] 23 DLR (3d) 385; *Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd. & Anor.* [1995] 2 CLJ 11; *Tate v. Williamson* [1866] 2 Ch App 55; *Swain & Anor. v. Law Society* [1981] 3 All ER 797, [1982] 1 WLR 17 and *Roche v. Sherrington & Ors.* [1982] 2 All ER 426, [1982] 1 WLR 599). Indeed as Stuart VC aptly said in *Makepeace v. Rogers* [1865] 34 LJ Ch 396:

> I conceive that, wherever the relation between the person who seeks an account and the person against whom it is sought arises out of an employment which partakes of a fiduciary character, the fiduciary character of the employment imposes upon the person employed, the duty of keeping accounts and of preserving vouchers, and, according to the old law, which I trust will continue to be the law of this court, a bill in such a case for an account in equity may be sustained.

The learned authors in the persons of Charlesworth and Cain on *Company Law* (12th edn) at p. 371, in style wrote:

> The fiduciary duties of directors are: (i) to exercise their powers for the purposes for which they were conferred and *bona fide* for the benefit of the company as a whole …; (ii) not to put themselves in a position in which their duties to the company and their personal interests may conflict.

I gratefully adopt the views of the learned authors in this judgment. In fact, no judge and no author can declare that what they had written are their original ideas. Originality comes from the pen of brilliant thinkers. It is how one conveys one's thought on paper that makes it an original approach. The idea may come from reading books, from reading judgments of past Judges who in turn rely on precedents found in the law books. It is the style of writing that makes the judgment tick – very interesting and lays down the law in a lucid fashion. *The Concise Oxford Dictionary*, 9th edn, at p. 962 defines the word "originality" as:

> the power of creating or thinking creatively, newness or freshness.

To me, a stale idea is not original. It is not new nor is it fresh.

Now, as alluded to earlier, s. 132 of the Companies Act 1965 requires a director to act honestly. In *Multi-Pak Singapore Pte Ltd. (in receivership) v. Intraco Ltd. & Ors* [1994] 2 SLR 282, there was an attempt to define the word "honesty" and the court there stated that it must be read with acting bona fide in the interests of the company and in exercising the discretion the director should only act to promote and advance the interests of the company. I believe Cohen J in *Clackwell v. Moray* [1991] 5 ACSR 255 of the New South Wales Supreme Court rightly laid down the law when he said that:

> A mere general sense of honesty of purpose is not in my view sufficient to satisfy the requirements that a director act *bona fide* for the benefit of the company. It requires at least a consideration of the views or of relevant material in order that he may act in a *bona fide* way. The abandonment of any proper consideration of relevant facts, the admitted failure to exercise an independent discretion and the mere doing of what was thought that the majority shareholder wanted cannot in these circumstances have amounted to the *bona fide* exercise of discretion required of a director.

It is also apt to refer to the case of *Hospital Products Ltd v. United States Surgical Corporation & Ors* [1984] 55 ALR 417, [1984] 156 CLR 41 on the law pertaining to a breach of fiduciary duty and the general principle governing the issue of the liability to account. The court there said this:

a The principle, accepted by the courts below, is that the fiduciary cannot be permitted to retain a profit or benefit which he has obtained by reason of his breach of fiduciary duty (*Consul Development Pty Ltd. v. DPC Estates Pty Ltd.* [1975] 132 CLR 373 at p. 393; *Queensland Mines Ltd. v. Hudson* [1978] 18 ALR 1 at page 4; [1978] 52 ALJR 399 at page 401). A fiduciary is liable to account for a profit or benefit if it was obtained: (1) in circumstances where b there was a conflict, or possible conflict of interest and duty; or (2) by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position.

c All these authorities when read cumulatively would be detrimental to the first defendant. The plaintiff's claim against the first defendant was solid as the rock of Gibraltar.

**The Plaintiff's Claims Against The 2nd To The 6th Defendants, And Against The 9th Defendant As Well As The 14th Defendant**

d The plaintiff's claims against the 2nd to the 6th defendants and the 9th defendant were based on constructive trusts. The constructive trusts arose out of these salient facts: that the 2nd to the 6th defendants and the 9th defendant dishonestly assisted the 1st defendant in breach of his fiduciary duties and they too knowingly received monies tainted with the element of trust in favour of e the plaintiff. Indeed, the cause of action against these defendants – referring to the 2nd to the 6th defendants and the 9th defendant, was for "knowingly in receipt" of trust funds and for knowingly assisting the 1st defendant in breach of his fiduciary duties to the plaintiff. The cause of action for "knowingly in receipt" was pleaded at para. 15 of the amended statement of f claim at encl. 13 and it was worded as follows:

15. Further or alternatively, the Plaintiff repeats paragraphs 7 to 13 herein and says that the 2nd to 12th Defendants knowingly received monies paid out of the Plaintiff's funds under the transactions in breach of the 1st Defendant's fiduciary duties referred to therein. Such said monies were impressed with a trust in favour of the Plaintiff. Consequently, the 2nd g to 12th Defendants are accountable to the Plaintiff as constructive trustees of all such monies.

PARTICULARS OF KNOWLEDGE

(a) The 2nd to 12th Defendants were aware that the 1st Defendant was a director of the Plaintiff, and consequently, were aware or ought to h have been aware that the 1st Defendant owed fiduciary duties to the Plaintiff.

(b) All of the 2nd to 12th Defendants had linkages and connections between one another and with the 1st Defendant as particularised in paragraph 11 herein, and each was aware of the links and connections i of and with the others.

(c) The 2nd to 12th Defendants were aware that in so far as each of them received a particular payment, when receiving such payment, they did so without any legal basis for or entitlement to, such payment.

(d) The 2nd to 12th Defendants were aware that in so far as each of them received a particular payment, such payment was made out of the funds and property of the Plaintiff.

Of course, the words employed were "knowingly received monies" and they conveyed the same meaning as "knowingly in receipt". While para. 14 of the amended statement of claim in encl. 13 showed the cause of action for "knowingly in receipt" of those monies where the 1st defendant had breached his fiduciary duties, and for brevity I will now reproduce them hereinunder:

The Plaintiff repeats paragraphs 7 to 13 herein and states that the 2nd to 12th Defendants knowingly and dishonestly assisted the 1st Defendant in facilitating the said payments in breach of the 1st Defendant's fiduciary duties averred to therein. Consequently, the 2nd to 12th Defendants and each of them are accountable to the Plaintiff as constructive trustees of all monies paid out of the Plaintiff's funds under the transactions in breach of trust referred to therein.

**PARTICULARS OF DISHONESTY**

(a) The 2nd to 12th Defendants were aware that the 1st Defendant was a director of the Plaintiff, and consequently, were aware or ought to have been aware that the 1st Defendant owed fiduciary duties to the Plaintiff.

(b) All of the 2nd to 12th Defendants had linkages and connections between one another and with the 1st Defendant as particularised in paragraph 11 herein, and each was aware of the links and connections of and with the others.

(c) The 2nd to 12th Defendants were aware that in so far as each of them received a particular payment, when receiving the payment, they did so without any legal basis for or entitlement to, such payment.

(d) The 2nd to 12th Defendants were fully aware that there was no legitimate commercial reason for the payments made to each of them, and that the payments were simply a device to transfer funds of the Plaintiff out of the Plaintiff's accounts.

(e) The 2nd to 12th Defendants were aware that in so far as each of them received a particular payment, such payment was made out of the funds and property of the Plaintiff.

On the other end of the fence, the plaintiff's claims against the 13th and 14th defendants were as volunteers who received moneys in breach of trust and who were obliged, under the law, to return those moneys to the plaintiff. The 13th and 14th defendants gave no consideration at all for those payments. And the cause of action against the 13th and 14th defendants were pleaded and it can be seen at paras. 16 and 17 of encl. 13 and they were worded as follows:

**The Claim against the 13th and 14th Defendants**

16 Of the payments referred to in paragraph 9(b) that were made in breach of the 1st defendant's fiduciary duties to the Plaintiff, some were made to and received by the 13th to 14th Defendants. The 13th and 14th Defendants gave no valuable consideration whatsoever in return for such payments. The 13th and 14th Defendants are consequently volunteers who, not having given consideration for such payments, are obliged to make full restitution thereof to the Plaintiff.

17 Alternatively, of the payments referred to in paragraph 9(b) that were made to the 13th and 14th Defendants in breach of the 1st Defendant's fiduciary duties to the Plaintiff, some or all of such payments were in actual fact made for the ultimate benefit of the 1st Defendant. In such premises, the 13th and 14th Defendants are constructive trustees of all such sums so received by each of them, and are accountable to the Plaintiff in respect of the same.

As stated earlier, the plaintiff was not proceeding against the 13th defendant. How fortunate he is!

The 2nd and the 6th defendants as well as the 9th defendant were aware that the 1st defendant was the managing director of the plaintiff and, consequently, they would have been aware or ought to have been aware of the fact that the 1st defendant owed certain fiduciary duties to the plaintiff. Once again, I reiterate that the connections between them and the 1st defendant have been explained at para. 11 of the amended statement of claim at encl. 13 and it had been alluded to somewhere in this judgment. Suffice for me to say that these defendants would have known that the funds from the plaintiff were being paid to them. There was no running away from this fact. The 6th defendant, from the recitals earlier, received large sums of money *via* cash cheques. The same would apply to the 14th defendant. These cash payments were entered in the books of the plaintiff as payments allegedly made to the 2nd defendant, the 3rd defendant or to one called Pharmtrade. According to the case of *Industrial Concrete Products Berhad v. Concrete Engineering Products Berhad* [2001] 2 AMR 2151, a third party may be liable as a constructive trustee for "knowing receipt" and for "knowing assistance". In *Belmont Finance Corporation v. Williams Furniture Ltd and Others (No: 2)* [1980] 1 All ER 393, a decision of the Court of Appeal with a coram of

Buckley, Goff and Waller LJJ, the court had occasion to consider the expression "constructive trust". Writing a separate judgment, this was what Buckley LJ had to say at p. 405 of the report:

> I now come to the constructive trust point. If a stranger to a trust (a) receives and becomes chargeable with some part of the trust fund or (b) assists the trustees of a trust with knowledge of the facts in a dishonest design on the part of the trustees to misapply some part of a trust fund, he is liable as a constructive trustee (*Barnes v. Addy* [1874] LR 9 Ch App 244 at 251-252 per Lord Selborne LC).

So, flowing from the lucid exposition of the law by Buckley LJ, it can be surmised that a director of a company would be in the same position as a trustee *vis a vis* the funds of the company in the context of a constructive trust situation.

**"Knowing Receipt"**

Once again, I refer to the decision of Buckley LJ in the *Belmont Finance (supra)*. At p. 405 at line "d" to line "e", his Lordship Buckley LJ had this to say:

> So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds. This is stated very clearly by Jessel MR in *Russell v. Wakefield Waterworks Co* [1875] LR 20 Eq 474 at 479, where he said:
>
> > In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.

and when applied to the facts of the present case, it sounded like this. That the 1st defendant as the managing director of the plaintiff in breach of his fiduciary duties misapplied the funds of the plaintiff so that those funds would come into the hands of some strangers to the trust who received them with the knowledge – be it actual or constructive, of that breach – the strangers cannot conscientiously retain those funds of the plaintiff unless the strangers had some better equity. The strangers became, in law, constructive trustees for the plaintiff in relation to the misapplied funds. In the context of the present case, the "strangers" would refer to the 2nd defendant right up to the 6th defendant as well as the 9th defendant together with the 13th and 14th defendants and they must be held accountable. Of course, as I said earlier that the plaintiff was not proceeding against the 13th defendant.

In relation to the claim for liability for "knowing receipt" by the 2nd defendant going right up to the 6th defendant as well as the 9th defendant, reference to the case of *Lian Keow Sdn Bhd v. Chelliah Paramjothy & Anor* [1988] 1 CLJ 57, 58; [1988] 1 CLJ 729 should be made. There the late Yusof Abdul Rashid J aptly said:

> As the instant case is a case in equity founded on breach of trust, it is trite law that in equity a person who receives trust property which he knows or ought to know is inconsistent with the terms of the trust, is accountable to the beneficiary under that trust. A stranger may be held liable to the beneficiary of a trust if he dishonestly allows himself to be used as an instrument of a breach of trust.

and his Lordship's observations should be vigorously applied to the factual matrix of the present case.

**"Knowing Assistance"**

It was the contention of the plaintiff that the defendants were all liable as constructive trustees for knowingly assisting the 1st defendant to act in breach of his fiduciary duties to the plaintiff. In relation to the claim for knowing assistance, reference to the speech of Buckley LJ in the *Belmont Finance (supra)* at p. 405 at line "h" would be ideal. There Buckley LJ had this to say:

> As I understand Lord Selborne LC's second head, a stranger to a trust notwithstanding that he may not have received any of the trust fund which has been misapplied will be treated as accountable as a constructive trustee if he has knowingly participated in a dishonest design on the part of the trustees to misapply the fund; he must himself have been in some way a party to the dishonesty of the trustees.

The elements of the claim for "knowing assistance" are amply set out in the decision of the Privy Council in the case of *Royal Brunei Airlines Sdn. Bhd. v. Philip Tan Kok Ming* [1995] 2 AC 378 and the facts in that case may be stated as follows. The plaintiff airline appointed as its agent in a particular area for the sale of passenger and cargo transportation a company of which the defendant was the managing director and principal shareholder. Under the agreement, the company was to hold in trust for the airline money received from such sale until it was accounted for by the company to the airline. With the defendant's knowledge and assistance the company paid the money in its current bank account instead of into a separate account, and in breach of trust the company used that money for its own business purposes. The company failed to pay to the airline sums due within the time specified by the agreement. The airline terminated the agreement and, the company having become insolvent, commenced proceedings against the defendant to recover the money owed by the company. The judge held that the defendant was liable

as constructive trustee to pay that amount to the airline. On appeal, the Court of Appeal of Brunei Darussalam reversed that decision, holding that the defendant could not be so liable because it had not been established that the company was guilty of fraud or dishonesty in relation to the money held in trust for the airline.

The airline appeal to the Privy Council with the coram of Lord Goff of Chieveley, Lord Ackner, Lord Nicholls of Birkenhead, Lord Steyn and Sir John May. In allowing the appeal, the Privy Council held that where a third party dishonestly assisted a trustee to commit a breach of trust or procured him to do so, the third party would be liable to the beneficiary for the loss occasioned by the breach of trust, even though the third party had received no trust property and irrespective of whether the trustee had been dishonest or fraudulent; that in the context of such accessory liability honesty was to be judged objectively and acting dishonestly, or with a lack of probity, which was synonymous, meant not acting as an honest person would act in the circumstances and could usually be equated with conscious impropriety as distinct from inadvertent or negligent conduct or carelessness, although a third party might be acting dishonestly if he recklessly disregarded the rights of others; that the third party's conduct had to be assessed on the basis of his actual knowledge at the time not what a reasonable person would have known or appreciated, and regard could be had to his personal attributes including experience and intelligence and the reason for him acting in that way; and that, accordingly, since the defendant had caused or permitted the company to commit a breach of trust by using in the conduct of its business money held in trust for the airline when he knew that the company was not authorised to do so by the terms of the trust, the defendant had acted dishonestly, and was, therefore, liable to the airline for the amount owed to it by the company.

Lord Nicholls of Birkenhead writing for the Privy Council aptly said at p. 385 to p. 386 of the report:

> *Earlier authority*
>
> The view that the accessory liability principle cannot be restricted to fraudulent breaches of trust is not to be approached with suspicion as a latter-day novelty. Before the accessory principle donned its *Barnes v. Addy*, LR 9 Ch. App. 244 strait-jacket, judges seem not to have regarded the principle as confined in this way. In *Fyler v. Fyler* [1841] 3 Beav. 550, 568, Lord Langdale MR expressed the view that, if trustees invested in an unauthorised investment, solicitors who knowingly procured that to be done for their own benefit 'ought to be considered as partakers in the breach of trust' even though the trustees intended in good faith that the investment would be beneficial to the life tenant and not prejudicial to the beneficiaries with interests in capital. The same judge, Lord Langdale MR, in *Attorney-General v. Corporation of Leicester* [1844] 7 Beav. 176, 179, stated:

> it cannot be disputed that, if the agent of a trustee, whether a corporate body or not, knowing that a breach of trust is being committed, interferes and assists in that breach of trust, he is personally answerable, although he may be employed as the agent of the person who directs him to commit that breach of trust.

In *Eaves v. Hickson* [1861] 30 Beav. 136 trustees, acting in good faith, paid over the fund to William Knibb's adult children on the strength of a forged marriage certificate produced to them by William Knibb. Sir John Romilly M.R. held that William Knibb was liable to replace the fund, to the extent that it was not recovered from his children, and to do so in priority to the liability of the trustees. Far from this being a case of fraud by the trustees, Sir John Romilly M.R., at p. 141, described it as a very hard case on the trustees, who were deceived by a forgery which would have deceived anyone who was not looking out for forgery or fraud.

This point did not arise in *Barnes v. Addy*, L.R. 9 Ch. App. 244. There the new sole trustee was engaged in a dishonest and fraudulent design. He intended to misapply the trust fund as soon as it reached his hands. The two solicitors were held not liable because there was no evidence that either of them had any knowledge or suspicion of this.

What has gone wrong? Their Lordships venture to think that the reason is that, ever since the Selangor case [1968] 1 WLR 1555 highlighted the potential uses of equitable remedies in connection with misapplied company funds, there has been a tendency to cite and interpret and apply Lord Selborne L.C.'s formulation in *Barnes v. Addy*, LR 9 Ch. App. 244, 251-252, as though it were a statute. This has particularly been so with the accessory limb of Lord Selborne L.C.'s apothegm. This approach has been inimical to analysis of the underlying concept. Working within this constraint, the courts have found themselves wrestling with the interpretation of the individual ingredients, especially 'knowingly' but also 'dishonest and fraudulent design on the part of the trustees,' without examining the underlying reason why a third party who has received no trust property is being made liable at all. One notable exception is the judgment of Thomas J in *Powell v. Thompson* [1991] 1 N.Z.L.R. 597, 610-615. On this point he observed, at p. 613:

> Once a breach of trust has been committed, the commission of which has involved a third party, the question which arises is one as between the beneficiary and that third party. If the third party's conduct has been unconscionable, then irrespective of the degree of impropriety in the trustee's conduct, the third party is liable to be held accountable to the beneficiary as if he or she were a trustee.

To resolve this issue it is necessary to take an overall look at the accessory liability principle. A conclusion cannot be reached on the nature of the breach of trust which may trigger accessory liability without at the same time considering the other ingredients including, in particular, the state of mind of the third party. It is not necessary, however, to look even more widely and

consider the essential ingredients of recipient liability. The issue on this appeal concerns only the necessary liability principle. Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not.

Continuing at p. 387 to p. 389 of the report, his Lordship, in style, said:

*Fault-based liability*

Given, then, that in some circumstances a third party may be liable directly to a beneficiary, but given also that the liability is not so strict that there would be liability even when the third party was wholly unaware of the existence of the trust, the next step is to seek to identify the touchstone of liability. By common accord dishonesty fulfils this role. Whether, in addition, negligence will suffice is an issue on which there has been a well-known difference of judicial opinion. The *Selangor* decision [1968] 1 WLR 1555 in 1968 was the first modern decision on this point. Ungoed-Thomas J, at p. 1590, held that the touchstone was whether the third party had knowledge of circumstances which would indicate to 'an honest, reasonable man' that the breach in question was being committed or would put him on inquiry. Brightman J. reached the same conclusion in *Karak Rubber Co. Ltd. v. Burden (No. 2)* [1972] 1 WLR 602. So did Peter Gibson J in 1983 in *Baden v. Societe Generale pour Favoriser le Development du Commerce et de l'Industrie en France S.A. (Note)* [1993] 1 WLR 509. In that case the judge accepted a five-point scale of knowledge which had been formulated by counsel.

Meanwhile doubts had been expressed about this test by Buckley and Goff LJJ in the *Belmont* case [1979] Ch. 250, 267, 275. Similar doubts were expressed in Australia by Jacobs P. in *D.P.C. Estates Pty. Ltd. v. Grey and Consul Development Pty. Ltd.* [1974] 1 NSWLR 443, 459. When that decision reached the High Court of Australia, the doubts were echoed by Barwick CJ, Gibbs and Stephen JJ: see *Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd.* ([1975] 132 CLR 373, 376, 398, 412.

Since then the tide in England has flowed strongly in favour of the test being one of dishonesty: see, for instance, Sir Robert Megarry VC in *In re Montagu's Settlement Trusts* [1987] Ch. 264, 285, and Millett J in *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265, 293. In *Eagle Trust Plc.v. S.B.C. Securities Ltd.* [1993] 1 WLR 484, 495, Vinelott J stated that it could be taken as settled law that want of probity was a prerequisite to liability. This received the imprimatur of the Court of Appeal in *Polly Peck International Plc. v. Nadir (No. 2)* [1992] 4 All ER 769,777 per Scott LJ.

Judicial views have diverged also in New Zealand. In *Westpac Banking Corporation v. Savin* [1985] 2 NZLR 41, 70, Sir Clifford Richmond preferred the approach in *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd.* [1979] Ch. 250, as did Tompkins J in *Marr v. Arabco Traders Ltd.* [1987] 1 NZBLC 102, 732, 102, 762. In *Powell v. Thompson* [1991] 1 NZLR 597, 612, 613, 615, Thomas J considered that the suggestion that negligence is not

enough to found liability is to be resisted. The test is one of unconscionable behaviour. This, and knowledge to match, whether actual or constructive, will suffice to herald a visit from equity. In *Equiticorp Industries Group Ltd. v. Hawkins* [1991] 3 NZLR 700, 728, Wylie J disagreed. He adhered to the concept of want of probity as the standard by which unconscionability was to be measured. In *Marshall Futures Ltd. v. Marshall* [1992] 1 NZLR 316, 325, Tipping J was concerned about the difficulty of identifying as unconscionable conduct which was less reprehensible than conduct which can be described as dishonest. He would, he said, at p. 325, prefer the herald of equity to be wearing more distinctive clothing than that suggested by Thomas J. In *Nimmo v. Westpac Banking Corporation* [1993] 3 NZLR 218, 228, Blanchard J preferred a test of dishonesty. Most recently, in *Springfield Acres Ltd. v. Abacus (Hong Kong) Ltd.* [1994] 3 NZLR 502, 510, Henry J observed that the law in New Zealand could not be regarded as settled.

Most, but not all, commentators prefer the test of dishonesty: see, among others, Peter Birks, 'Misdirected funds: restitution from the recipient' [1989] L.M.C.L.Q. 296; M.J. Brindle and R.J.A. Hooley, 'Does constructive knowledge make a constructive trustee?' [1987] 61 ALJ 281; *Charles Harpum, 'The stranger as constructive trustee'* [1986] 102 LQR 114, 267; *Birks, The Frontiers of Liability* (1994), vol. 1, p. 9; Patricia Loughlan, 'Liability for assistance in a breach of fiduciary duty' [1989] 9 O.J.L.S. 260; *Parker and Mellows, The Modern Law of Trusts*, 6th edn. (1994), p. 253; *Pettit, Equity and the Law of Trusts*, 7th ed. (1993), p. 172; Philip Sales, *'The tort of conspiracy and civil secondary liability'* [1990] 49 CLJ 491; *Snell's Equity*, 29th ed. (1990), p. 194; and *Underhill's Law of Trusts and Trustees*, 14th ed. (1987), p. 355 and noter-up.

On "dishonesty", his Lordship had this to say at p. 389 of the report:

*Dishonesty*

Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg. v. Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what

constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standard of each individual. If a person knowingly appropriate another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.

Finally, at p. 389 spilling over to p. 391 of the report, his Lordship remarked:

*Taking risks*

All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.

This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers, but nevertheless he decides to proceed in the belief or hope that this will be beneficial to the beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly. This is the type of risk being addressed by Peter Gibson J in the *Baden* case [1993] 1 WLR 509, 574, when he accepted that fraud includes taking 'a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take.

This situation, in turn, is to be distinguished from the case where there is genuine doubt about whether a transaction is authorised or not. This may be because the trust instrument is worded obscurely, or because there are competing claims, as in *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)* [1969] 2 Ch. 276, or for other reasons. The difficulty here is that frequently the situation is neither clearly white nor clearly black. The dividing edge between what is within the trustee's powers and what is not is often not clear-cut. Instead there is a gradually darkening spectrum which can be described with labels such as clearly authorised, probably authorised, possibly authorised, wholly unclear, probably unauthorised and, finally, clearly unauthorised.

The difficulty here is that the differences are of degree rather than of kind. So far as the trustee himself is concerned the legal analysis is straightforward. Honesty or lack of honesty is not the test for his liability. He is obliged to comply with the terms of the trust. His liability is strict. If he departs from the trust terms he is liable unless excused by a provision in the trust instrument

or relieved by the court. The analysis of the position of the accessory, such as the solicitor who carries through the transaction for him, does not lead to such a simple, clear-cut answer in every case. He is required to act honestly; but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do?

The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J captured the flavour of this, in a case with a commercial setting, when he referred to a person who is 'guilty of commercially unacceptable conduct in the particular context involved: 'see *Cowan de Groot Properties Ltd. v. Eagle Trust Plc*. [1992] 4 All ER 700, 761. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.

Before leaving cases where there is real doubt, one further point should be noted. To inquire, in such cases, whether a person dishonestly assisted in what is later held to be a breach of trust is to ask a meaningful question, which is capable of being given a meaningful answer. This is not always so if the question is posed in terms of 'knowingly' assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the 'sort' of knowledge required, when the trust is that 'knowingly' is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind.

Now, the particulars of "dishonesty" relied upon by the plaintiff *vis a vis* the 2nd defendant to the 6th defendant as well as the 9th defendant can be seen at para. 14 of the amended statement of claim in encl. 13 which was reproduced earlier. To say the least, these defendants knew and were aware of the nature and position of the first defendant. Their connections with the

first defendant have been explained at length at para. 11 of the amended statement of claim in encl. 13 which was reproduced earlier. These defendants clearly received payments without any legal basis or entitlement whatsoever. There was no legitimate commercial reason for these defendants to receive the plaintiff's funds and the payments were simply a device to transfer funds belonging to the plaintiff out of the plaintiff's accounts. It was in the nature of a daylight robbery.

The 14th defendant too received funds belonging to the plaintiff and, with respect, he was also not entitled to receive those funds. There was no consideration advanced by the 14th defendant and, in my judgment, he should not be allowed to retain those sums. The 14th defendant should effect restitution to the plaintiff forthwith. Lord Goff of Chieveley and Gareth Jones in their book entitled *"The Law Of Restitution"*, 5th edn at p. 745 wrote this salient passage:

> In principle, a recipient should be liable, subject to defences, to make restitution even though he has no notice that the property has been transferred in breach of trust. He has been unjustly enriched at the beneficiaries' expense.

Likewise here, the 14th defendant was "unjustly enriched" at the plaintiff's expense. Restitutio in integrum. As far as money is concerned, the injured person should be put in the same position as he would have been in if he had not sustained the wrong. An array of authorities on restitution in integrum are easily compiled by referring to the law books and these authorities are certainly interesting reading materials for everyone alike:

(1) *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas 25 at 39, HL;

(2) *The Argentino* [1888] 13 PD 191 at 196, CA;

(3) *Banco de Portugal v. Waterlow & Sons Ltd* [1932] AC 452 at 474;

(4) *Monarch SS Co Ltd v. Karlshamns Olje fabriker AB* [1949] AC 196 at 221, [1949] 1 All ER 1 at 12;

(5) *British Transport Commission v. Gourley* [1956] AC 185 at 197, [1955] 3 All ER 796 at 799;

(6) *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528 at 539, [1949] 1 All ER 997 at 1002, CA;

(7) *Koufos v. C. Czarnikow Ltd* [1969] 1 AC 350 at 420, [1967] 3 All ER 686 at 714, HL;

(8) *Robinson v. Harman* [1848] 1 Exch 850 at 855;

(9) *Bain v. Fothergill* [1874] LR 7 HL 158 at 207;

(10) *France v. Gaudet* [1871] LR 6 QB 199;

(11) *Chaplin v. Hicks* [1911] 2 KB 786 at 794, CA;

(12) *Wertheim v. Chicoutimi Pulp Co* [1911] AC 301, PC;

(13) *Abrahams v. Herbert Reiach Ltd* [1922] 1 KB 477 at 480; and

(14) *The Mediana* [1900] AC 113 at 119, HL.

We have a civilised system of law in our country. So any unjust enrichment or unjust benefit would be frowned upon by our courts vigorously. The courts would prevent anyone from retaining any money or from benefitting any money which go against the conscience of anyone to keep that money for himself (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61, [1942] 2 All ER 122 at 135). Apart from the common law, equity too has developed noble principles aimed at providing a remedy for unjustifiable enrichment. In equity, it is now trite that neither a trustee nor any other person in a fiduciary position may retain a profit made in the course of or by means of his office or the office in which he holds. So, where there has been a breach of this august principle, which principle would also extend, far and wide, to constructive trusts, then the remedies provided by the law of trusts would be applicable in order to enable a beneficiary to recover what was, in fact, due to him (*Re Exchange Banking Co, Flitcroft's Case* [1882] 21 Ch D 519, CA). The mechanism of tracing too has been developed by equity where a fiduciary relationship exists to enable property or money to be recovered from third parties into whose hands it has passed (*Sinclair v. Brougham* [1914] AC 398, HL; and *Ministry of Health v. Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL). But for the recovery of property, the remedy may be defeated where the legal interest to that property passes into the hands of a purchaser in good faith without notice of the equity (*Marsh v. Lee* (1670) 2 Vent 337).

**Evidence Of A Calculated Design**

The first defendant was quite cunning. He meticulously set up a large scale network to channel out the funds of the plaintiff and that the 2nd to the 6th defendants as well as the 9th defendant were active players in this network. Suffice for me to say that the first defendant had used an elaborate set of accounts and other primary documents in order to conceal all these clandestine payments. I must elaborate further. The first defendant procured the creation of false invoices and false entries in the plaintiff's accounts in order to reflect the purported purchases of RM100,047,000 worth of toiletries from the 2nd defendant. False invoices reflecting the purported sales of RM97,453,000 by the plaintiff were also made. Details of these false invoices and the modus operandi of the 1st defendant are amply set out at paras. 17 to 19 of encl. 7

and exh. "KT7" of encl. 7. Now, encl. 7 was, as I said earlier, the affidavit of Kenneth Teh Ah Kiam that was affirmed on 26 June 2001, and there he affirmed at paras. 17 to 19 the following:

> 17. The investigation conducted by the R&M revealed that over the period between 1996 and 1998, the 1st Defendant caused or procured the creation of invoices and procured the making of entries in the accounting records of the Plaintiff that were intended and designed to reflect purported purchases, by the Plaintiff of toiletries (`the said Toiletries') totalling approximately RM100,047,000.00 from the 2nd Defendant. The 1st Defendant also caused or procured the creation of invoices ('the Invoices') and other documents and procured the making of entries in the accounting records of the Plaintiff intended and designed to reflect purported sales, by the Plaintiff, of the said Toiletries to the purported buyers below (collectively 'the Purported Buyers'), in the sum of approximately RM97,453,000.00. The Purported Buyers were:
>
> (a) The 3rd Defendant;
>
> (b) The 4th Defendant;
>
> (c) DCH International Ltd ('DCH');
>
> (d) Galaxy Sun Industries Ltd ('Galaxy Sun');
>
> (e) Pharmtrade;
>
> (f) Star Impetus; (and)
>
> (g) Symmetry Point.
>
> 18. The 1st Defendant signed most of the invoices. Of the remainder, the 9th Defendant signed some, while Cik Salmah bte Ismail, another employee of the Plaintiff, signed some on the instructions of the 9th Defendant. In both cases, I verily believe that the ultimate instructions to sign the Invoices came from the 1st Defendant. I verily believe that the 9th Defendant worked closely with the 1st Defendant.
>
> 19. The entries in the accounting records and the invoices created by the 1st Defendant to substantiate the purported purchase and sale of toiletries were characterised by a number of significant discrepancies and irregularities which tend to infer that the purchases were fictitious. For a start, the invoices purportedly issued to DCH listed DCH as having an address in the United Kingdom. I verily believe that there is no company or other corporate entity known going by that name registered in the list of companies in the United Kingdom. I say this because I requested the office of Pricewaterhouse Coopers in the United Kingdom to conduct a search of the companies registry in the United Kingdom and I was informed that there was no such entity registered. Further, I verily believe that the underlying documents purporting to substantiate the purchases and sales of the said Toiletries, had the following features indicating that the documents and other accounting records in relation to the purchase transactions referred to therein were fictitious. The features are:

(a) There were no purchase orders relating to any of the purported purchases of the said Toiletries by the Purported Buyers that could be found. This is not in line with the Plaintiff's normal business practice in relation to its established business of manufacturing and sales of pharmaceuticals.

(b) The invoices themselves in any event made no reference to any purchase order placed by any of the Purported Buyers.

(c) There were no documents evidencing the terms on which, and the method by which, delivery of the Toiletries were to be made. Again, this is not in line with the Plaintiff's normal business practice.

(d) There were no documents evidencing the terms by which payment was to be made for the Toiletries. Again, it would be reasonable to assume that had these sales been genuine, the Plaintiff would have given some indication as to payment terms.

(e) There were no documents indicating or evidencing receipt of the Toiletries by the Purported Buyers.

(f) There was a total absence of correspondence between the Plaintiff and the 2nd Defendant on the one hand, and between the Plaintiff and the Purported Buyers on the other, concerning any negotiation on the terms of the Purported transactions, which is highly unusual and highly suspicious.

(g) There were blank pre-acknowledged unused invoices that had been rubber-stamped in advance in the name of some of the Purported Buyers. These were found at the premises of the Plaintiff by the R&M after their appointment. This very unusual fact indeed adds to the inference that the sales and purchases of the Toiletries were not genuine. Annexed herewith and marked as exhibit 'KT-7' are copies of the blank pre-acknowledged unused invoices.

(h) Most of the purported 'payments' from the Plaintiff to the 2nd Defendant and from the Purported Buyers to the Plaintiff were made by contra book entries in the Plaintiff's accounting records.

(i) Invoices and delivery orders purportedly from the 2nd defendant showed that the 2nd Defendant shared the same telephone and facsimile numbers as the Plaintiff.

(j) No attempt had been made by the Plaintiff whilst under the control of the 1st Defendant to recover any amounts outstanding from any of the Purported Buyers despite the debts having been shown as outstanding in the books for more than two years.

(k) One Swaminathan a/l Sambantham, an employee of the Plaintiff confirmed that he was asked to sign some blank delivery orders purporting to show deliveries by the 2nd Defendant.

(l) The documents showed that the quantities purportedly supplied by the 2nd Defendant were typically in rounded up amounts of 10,000 or 25,000 per order.

(m) The delivery orders did not state the mode of delivery, a very unusual omission.

(n) The Plaintiff will refer to the accounting records of the Plaintiff at the trial of this action for their full terms and effect.

There was substantial banker's acceptance facilities amounting to RM21,870,000 and such facilities were also obtained by the plaintiff as set out at para. 20 of encl. 7. I have no choice but to reproduce para. 20 of encl. 7 in verbatim:

20. From the documents of the Plaintiff that the R&M have looked at since their appointment, the R&M determined that various banks had extended Bankers' Acceptance facilities ('BA Facilities') to the Plaintiff. The investigation conducted by the R&M also revealed that there are also questionable transactions in relation to the BA Facilities. The circumstances are as follows:

(1) At all material times, the Plaintiff had been extended BA Facilities by the following banks:

(a) Affin Bank Berhad ('Affin Bank');

(b) Arab-Malaysian Bank Berhad ('AMBB');

(c) Southern Bank Berhad ('SBB');

(d) Malayan Banking Berhad ('MBB').

(2) The total amount outstanding under all the BA Facilities as at the date of the appointment of the R&M was approximately RM21,870,000.00 and the Plaintiff is primarily exposed to the said banks for this liability.

(3) The R&M's investigation revealed that the Plaintiff submitted at least 91 invoices that were questionable to the aforementioned banks under the BA facilities. Details of the said invoices and of the banks and so forth are set out in the table below for ease of reference.

| | No. of invoices | Total (RM) | Transaction Period |
|---|---|---|---|
| Affin Bank | 67 | 16,395,000 | Oct 97 – Apr 98 |
| AMBB | 4 | 1,290,000 | Feb 98 – Apr 98 |
| SBB | 11 | 2,000,000 | Apr 98 – Sept 98 |
| MBB | 9 | 2,185,000 | May 98 – Sept 98 |
| Total | 91 | 21,870,000 | |

(4) Again the parties involved in purported transactions with the Plaintiff that were used to obtain funds from the aforementioned banks were:

(a) The 2nd Defendant;

(b) The 3rd Defendant;

(c) The 4th Defendant;

(d) Star Impetus;

(e) Symmetry Point;

(f) Pharmtrade;

(g) Apotheca Marketing Pte Ltd ('Apotheca');

(h) Ekim Holding Sdn Bhd ('Ekim');

(i) Farmasi Tan;

(j) Minovas Members Corporation ('Minovas');

(k) Primabumi Sdn Bhd ('Primabumi');

(l) Remedi Pharmaceuticals (M) Sdn Bhd ('Remedi'); and

(m) Shoppe D'KUB ('D'KUB').

(5) Apotheca, Ekim, Remedi, Primabumi, Minovas and D'KUB have confirmed that they have:

(a) never placed any order for any 'goods' referred to in the invoices;

(b) never received any 'goods' allegedly 'supplied' by the Plaintiff under the invoices.

Annexed hereto and marked as exhibit 'KT-8' are copies of letters received by the R&M from the said parties in response to the queries of the R&M. The R&M has no reason to doubt the responses.

(6) Neither the 2nd Defendant nor any of the Purported Buyers responded to the R&M's queries in respect of the invoices.

(7) The invoices submitted in respect of the BA Facilities have the following questionable features:

(a) There are no matching references or entries in the accounting records of the Plaintiff in respect of all the invoices referred to in sub-paragraph (3) above except for 6 invoices. In 4 out of these 6 entries in the accounting records, only the invoice reference numbers were entered but not the monetary values. Annexed hereto and marked collectively as 'KT-9' are copies of the aforesaid 6 invoices. This is highly suspicious and not in accordance with normal business practices.

(b) 7 invoices by the Plaintiff to Affin Bank carry the same invoice number as 7 invoices issued to the Purported Buyers; however, the invoices refer to different underlying 'goods' and different Purported Buyers. Each duplicated invoice has the same date and amount except one. Particulars of the duplicated invoices are as set out in the document prepared by the R&M's staff, a copy of which is annexed hereto and marked as exhibit 'KT-10'. Annexed herewith and marked collectively as exhibit bundle 'KT-11' and duly indexed are copies of the aforesaid 7 invoices submitted by the Plaintiff to Affin Bank and the aforesaid 7 invoices issued to the Purported Buyers. It may be inferred that one set of the Invoices was fabricated for the purposes of obtaining BA financing.

(c) 1 invoice submitted by the Plaintiff to MBB carries the same invoice number and customer name as that of 1 of the invoices issued to one of the Purported Buyers; however the rest of the details of both invoices differ. There is no plausible explanation for this and this adds to the highly suspicious nature of this transaction. Annexed herewith and marked collectively as exhibit bundle 'KT-12' is a copy of the aforesaid invoice submitted by the Plaintiff to MBB and a copy of the aforesaid invoice issued to one of the Purported Buyers.

(d) 3 invoices submitted by the Plaintiff to MBB bore the same invoice numbers as that of 3 invoices issued to the Purported Buyers; however the rest of the details of these invoices differ. Annexed herewith and marked collectively as exhibit 'KT-13' are copies of the aforesaid 3 invoices submitted by the Plaintiff to MBB and copies of the aforesaid 3 invoices issued to the Purported Buyers. Again, there does not appear to be any plausible or credible explanation.

(e) Besides the invoices referred to in (c) and (d), the residual 87 invoices do not in any way match any of the invoices issued in relation to the sales of the Plaintiff. Attached herewith and marked collectively as exhibit 'KT-14' are copies of the aforesaid 87 invoices in relation to the BA Facilities. This is highly suspicious as one would have expected that there would be some correlation if the invoices were genuine.

Surreptitious invoices of purported transactions with the plaintiff were used to obtain payments out of these banker's acceptance facilities ("BA Facilities"). Details of these purported transactions can be seen at para. 20 of encl. 7 as reproduced above and suffice that I briefly allude to them:

(1) exhibit "KT-8" of encl. 7, comprised the letters from various parties who denied placing orders with the plaintiff or receiving any of the goods allegedly supplied to them;

(2) exhibit "KT-9" of encl. 7 comprised invoices where only the invoice reference numbers but not the monetary values were entered in the plaintiff's accounting records;

(3) exhibits "KT-10" and "KT-11" of encl. 7 comprised invoices issued by the plaintiff to Affin Bank which carried the same numbers as invoices to purported buyers; and both these two sets of invoices refer to different underlying goods and different purported buyers;

(4) exhibits "KT-12" and "KT-13" of encl. 7 were invoices issued to Malayan Banking Berhad with the same invoice numbers and customer numbers as those issued to the purported buyers; and the details of these invoices were substantially different; and

(5) exhibit "KT-14" of encl. 7 comprised invoices issued for the BA Facilities which did not match any of the invoices issued for sales by the plaintiff.

**What Is A Mareva Injunction?**

The court has the power to restrain any defendant from removing assets, whether money or goods, from the jurisdiction pending the trial of the action whenever it is just or convenient to do so (*Nippon Yusen Kaisha v. Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, CA; *The Mareva* [1980] 1 All ER 213 n, CA; and *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [1978] QB 644, [1977] 3 All ER 324, CA). The power to grant a mareva injunction would extend to the situation where the defendant is not only out of jurisdiction but it also extends to a defendant who is based within jurisdiction (*Prince Abdul Rahman bin Turki Al Sudairy v. Abu-Taha* [1980] 3 All ER 409, [1980] 1 WLR 1268, CA); and so the court may restrain the defendant from disposing of or dissipating his assets within the jurisdiction (*Z Ltd v. A* [1982] 1 All ER 556, [1982] 2 WLR 288, CA). It is said that a mareva injunction operates in rem and that it takes effect from the very moment it is pronounced on every asset of the defendant to which it is granted. This is to enable everyone and anyone who has notice or knowledge of it to be obliged to do whatever he can reasonably do in order to preserve the assets covered by its terms and if that person assists in disposing of those assets in whole or in part then he may be cited and be found guilty of contempt of court and he would be severely punished (*Z Ltd v. A (supra)*). It is trite to state that a mareva injunction would extend not only to a debt or liquidated demand, it would also extend far and wide. It would for instance extend to commercial actions as well as to any actions and claims for damages for breach of contract or for tort (*Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252, CA). Of pertinence would be this. That a mareva injunction would be granted to assist and to aid execution (*The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460). But the court is always magnanimous. It would and it has power to do the following things:

(1) to allow part of the assets or money covered by a mareva injunction to be released (*Iraqi Ministry of Defence v. Arcepey Shipping Co SA* [1981] QB 65, [1980] 1 All ER 480); and

(2) that such release would only be for a proper purpose (*A v. C (No: 2)* [1981] QB 961, [1981] 2 All ER 126).

The guidelines to be adhered to before a mareva injunction is issued may be stated as follows:

(a) the plaintiff must make a full and frank disclosure of all matters within his knowledge which are very material for the presiding judge to know;

(b) the plaintiff must give the correct particulars of his claim against the defendant by stating fairly accurately the grounds of his claim and its amount and stating lucidly the relevant points thereto – in short, the plaintiff must show "a good arguable case" (*Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (supra)*);

(c) the plaintiff must set out the relevant grounds for believing that the defendant has assets within jurisdiction;

(d) the plaintiff must also set out the relevant grounds for believing that there is a risk of the assets being removed before the judgment or any award is made; and last but by no means least

(e) the plaintiff must be willing to give an undertaking as to damages (*Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (supra)*; and *Allen v. Jambo Holdings Ltd (supra)).*

From the long line of authorities, it is a correct statement of the law to say and I so say that a mareva injunction is an interlocutory order designed solely to prevent a defendant from defeating the effect of a judgment which may be entered against him by disposing of his assets before execution on the judgment can take place. Essentially a mareva injunction restrains the defendant from disposing of, removing elsewhere or dissipating his assets.

In *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260, the Federal Court held that the High Court has jurisdiction to grant a mareva injunction in appropriate circumstances on the strength of para. 6 of the Schedule to the Courts of Judicature Act 1964. Zainal Abidin's decision has been followed in *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319; and *Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50.

**Circumstances Justifying A Mareva Injunction**

For the reasons as alluded to above, I must say that the plaintiff has made out a good arguable case against the 2nd defendant right up to the 6th defendant as well as the 9th and the 14th defendants in the context of encl. 6. These named defendants ought to make restitution of the monies belonging to the plaintiff which were received by them. That these named defendants received monies belonging to the plaintiff cannot be disputed. The stark facts are there for everyone to discern. All these named defendants, in my judgment, are clearly in possession of assets within the jurisdiction and they clearly fall within the ambit and scope of the principles of law enunciated by Zakaria Yatim J (as he then was) in the case of *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors* [1985] 2 MLJ 237. At p. 241 to p. 242 of the report, his Lordship Zakaria Yatim J (as he then was) aptly said:

> I shall first deal with the essential requirements in respect of the Mareva injunction. In *Ace King Pte. Ltd. v. Circus Americano Ltd & Ors.* [1985] 1 MLJ 75, I stated that there are two requirements to be satisfied with for a Mareva injunction to be granted. But for the purpose of the present judgment, I propose to split them into three ingredients, namely:
>
> (i) the plaintiffs must show that they have a good arguable case;
>
> (ii) the plaintiffs must produce evidence that the defendant has assets within jurisdiction; and
>
> (iii) that there is a risk of the assets being removed before the judgment is satisfied.

The guidelines for the issuance of a mareva injunction as set out by me earlier would further shackle all these named defendants – referring to the 2nd defendant right up to the 6th defendant as well as the 9th and the 14th defendants.

With respect, the 14th defendant ought to know the law. As an advocate and solicitor, the 14th defendant's culpability would be more severe. As I said there was no valuable consideration given by the 14th defendant and he must, under the law, make full restitution to the plaintiff. As constructive trustee, the 14th defendant should be held accountable to the plaintiff for all those sums of monies which he received. The duties of being a member of the bar are very onerous. Allow me to illustrate by setting forth some authorities:

(1) the court may summarily order a solicitor to perform certain undertakings in order to ensure honesty in conducting the case bearing in mind that the solicitor is an officer of the court (*Re Hilliard, ex parte Smith* [1845] 2 Dow & L 919; and *United Mining and Finance Corpn Ltd v. Becher* [1910] 2 KB 296 at 304, and on appeal reported in [1911] 1 KB 840, CA);

(2) the court may order the solicitor to pay costs (*Brendon v. Spiro* [1938] 1 KB 176, [1937] 2 All ER 496);

(3) the court may order the solicitor to make good any loss caused by his neglect or breach of duty (*Marsh v. Joseph* [1897] 1 Ch 213 at 245, CA);

(4) the court may also order the solicitor to reimburse the money to his client (*Re Grey* [1892] 2 QB 440 at 447, CA; and *Re A Solicitor, ex parte Hales* [1907] 2 KB 539 at 544); and

(5) the solicitor may even be suspended or his name may even be struck off the roll for misconduct (*Re Gregg, Re Prance* [1869] LR 9 Eq 137 at 141).

These are some of the pitfalls of practising law. It is known to all practitioners. It was averred in the amended statement of claim in encl. 13 that the payments as stated in para. 9(b) of the same were made to the 13th and the 14th defendants in breach of the 1st defendant's fiduciary duties to the plaintiff and that some or all of such payments were made, in actual fact, for the ultimate benefit of the 1st defendant. These averments, if true, were indeed shocking. Again I must state that the plaintiff was not keen in proceeding against the 13th defendant.

Given the highly surreptitious nature of the scheme to which the various defendants were parties and were in league with one another together with the circumstances in which payments were received by them, there was certainly a high probability that the monies received by the various defendants may be dissipated in order to evade judgment. Dissipation is an ugly word. Based on the prevailing circumstances as alluded to in the affidavits and all other documents found in this case and which have been alluded to in this judgment, it can safely be inferred that there was a real risk of dissipation of assets thereby warranting the grant of a mareva injunction. All these assets belong to the plaintiff.

The plaintiff had so many "fears". One of them is this. That the various defendants may attempt to flee the jurisdiction and so the plaintiff sought this court's indulgence to order the delivery up of the 5th, 6th and 14th defendants' passports. To surrender their passports to the court would be the best method to prevent them from fleeing the country with their ill-gotten gains. The English Court of Appeal with Fox and Ralph Gibson LJJ presiding in the case of *Bayer A.G. v. Winter And Others* [1986] 1 WLR 497 had occasion to consider restraining the defendant from leaving the country and to deliver up the passports. Writing a separate judgment, Fox LJ had this to say at p. 502 to p. 503 of the report:

> For the reasons which I have indicated, therefore, I would be prepared to grant the order which Mr. Prescott now seeks; that is to say, an injunction restraining the first defendant from leaving the jurisdiction, and secondly, that he deliver up his passports. The orders are, in my view, in Sir George Jessel M.R.'s words 'necessary and reasonable [orders which] are ancillary to the due performance of [the court's] functions.' Cumming-Bruce LJ in House of *Spring Gardens Ltd. v. Waite* [1985] FSR 173, 183, emphasised the power and duty of the court (in relation to a case where an order had been made that the defendants identify their assets and disclose their whereabouts) to take 'such steps … as will enable the order to have effect as completely and successfully as the powers of the court can procure'.

I subscribe fully to the views of Fox LJ.

**Undertaking As To Damages**

The plaintiff gave an undertaking as to damages and proceeded to produce a valid undertaking furnished by Affin Bank who were instrumental in appointing the receivers and managers. Paragraph 36 of encl. 7 – the affidavit of Kenneth Teh Ah Kiam, explained the matter in this way:

> **Undertaking**
>
> 36. The Plaintiff is in receivership, and has been in receivership since 14.9.98. The Plaintiff alone is unable to sustain any undertaking in damages that this Honourable Court may require the Plaintiff to give. However, the Plaintiff has been able to obtain an undertaking from Affin Bank that it will meet any order for damages should this Honourable Court be of the view that there are damages sustained by any or all of the Defendants which the Plaintiff shall have to pay. A copy of the undertaking of Affin Bank is annexed hereto and marked as exhibit 'KT-15'.

Of course, the ability of the plaintiff to honour his undertaking is a material factor to consider on the balance of convenience (*American Cyanamid case* [1975] 1 All ER 504 at p. 510). However, the courts are quite magnanimous because it would not deny the plaintiff an interlocutory injunction simply because the plaintiff is poor or of very limited financial means (*Allen v. Jambo Holdings Ltd (supra)*). Here, the plaintiff was certainly worth "powder and shot" (*Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case* [2001] 5 CLJ 73, 125) and the undertaking was simply to vest unto the court the jurisdiction to make the appropriate orders to recompense the loss in the event it is shown that the plaintiff was not entitled to the mareva injunction in the first place.

**The Defences Raised By The Defendants**

It must be borne in mind that the 2nd to the 6th defendants as well as the 9th defendant and the 14th defendant have entered an appearance. By this act, they have "officially communicate(d)" their "intention to defend or challenge the action" (Jeffrey Pinsler on "*Civil Procedure*" at p. 135). They now vigorously challenged encl. 6.

The 2nd, 3rd, 4th and 6th defendants heavily relied on the pending proceedings in civil suit no: D2-22-4385-1998 (hereinafter referred to as the "D2 suit") and they challenged the validity of the appointment of the receivers and managers and the authority of the receivers and managers to institute these proceedings (see the averments at paras. 4 to 7 of encl. 16). The authority of the receivers and managers to carry on with these proceedings came from the debentures as set out in exhs. "KT-1" and "KT-2" of encl. 7. To me, the D2 suit would be wholly irrelevant to these proceedings because the D2 suit was in relation to the issue of the power of possession of sale of a company's assets by the receivers and managers and so it has got no bearing or relevance to the present proceedings. The judgment in the D2 suit relied upon by the 2nd, 3rd, 4th and 6th defendants was made in the context of an interlocutory application and it was not a binding finding of fact to this court. Furthermore, in the D2 suit, there was no finding made therein to the effect that the debentures pursuant to which the receivers and managers were appointed were void. The judgment of the D2 suit can be seen at exh. "R-1" of encl. 16 and the averments at paras. 5 and 6 of encl. 23 should be referred to and which I now do:

> 5. I crave to refer to paragraph 4 of Rajaram's Affidavit and strictly deny that the R&M do not have the valid authority to commence this action. In this respect I repeat paragraph 1 and Exhibits 'KT-1' and 'KT-2' of my 1st Affidavit wherein I set out in detail the authority pursuant to which the R&M are acting. As stated at paragraph 2 of my 1st Affidavit, I am advised by the R&M's solicitors and verily believe that the R&M is empowered to bring these proceedings and this issue will be addressed by the R&M's counsel before this Honourable Court if necessary.
>
> 6. I now crave to refer to paragraph 6(a) of Rajaram's Affidavit and strictly deny the allegations contained therein. Civil Suit No: D2-22-4385-1998 ('The D2 Suit') has no bearing whatsoever on any of the issues in these proceedings or on the authority of the R&M to commence these proceedings or to seek the relief sought herein.
>
> 6.1 The D2 suit and the Grounds of Judgment dated 22.5.2001, a copy of which is set out as Exhibit 'R-1' to Rajaram's Affidavit, relate to the issue of the power of possession and sale of a company's assets by the R&M, which is wholly different from the nature of relief sought against the Defendants to these proceedings;

6.2 The statement by the Learned Judge in the D2 suit that 'I am prepared to find that there is a serious issue to be tried whether the debentures are void and therefore the appointment of the receivers and managers is not valid' was made in the context of an interlocutory application and is NOT a finding of fact and is in no way binding on this Honourable Court. In fact, the Learned Judge did accept that it could not be said that there was a clear case that the debentures were void.

6.3 The decision of the Learned Judge in the D2 suit is currently the subject of an appeal to the Court of Appeal vide Civil Appeal No: W-02-525-2001;

6.4 Once again, the distinctions between the D2 suit and these proceedings will be addressed in detail by the Plaintiff's counsel before this Honourable Court.

It was further argued by the 2nd, 3rd, 4th and 6th defendants that the plaintiff had failed to set out the source of information in relation to the belief that the defendants had dishonestly assisted the 1st defendant to dissipate their assets from within jurisdiction (see the averments in Bahasa Malaysia at paras. 8 and 10 of encl. 16). It would be ideal to state that paras. 4 and 5 of encl. 7 amply set out in clear detail the cause of action against the defendants and I can do no better than to reproduce them in verbatim:

**Plaintiff's Cause(s) of Action**

4. I refer to the Writ of Summons and Statement of Claim in this action. I verily believe the 1st Defendant breached various fiduciary duties owed by the 1st Defendant to the Plaintiff in his capacity as director and Managing Director of the Plaintiff. The Plaintiff's claim against the 1st Defendant is predicated upon such breaches of duty.

5. The Plaintiff claims against the 2nd to 12th Defendants as constructive trustees. The constructive trust arises by virtue of the fact that the said 2nd to 12th Defendants dishonestly assisted the 1st Defendant in breach of his fiduciary duties, and/or knowingly received monies impressed with a trust in favour of the Plaintiff. The Plaintiff claims against the 13th and 14th Defendants as volunteers who received money in breach of trust and who are obliged, not having given valuable consideration in respect thereof, to make restitution of the sums received.

The description of the plaintiff's claim can be seen at paras. 12 to 15 of encl. 7 while paras. 16 to 21 of encl. 7 amply set out the circumstances and the factual matrix on which the claim for a mareva relief was made. Substantial evidence too was shown in regard to the various payments received by the various defendants. These payments cannot by any stretch of the imagination be linked to any underlying transaction or legitimate purpose of the plaintiff. And coupled with the links between the various defendants – including the

2nd, 3rd, 4th and 6th defendants, with the plaintiff it showed cumulatively that the defendants had acted as a cooperative network to facilitate payments out of the plaintiff. They, in league, bled the plaintiff dry – financially, of course. Paragraphs 8 and 10 of encl. 23 are self explanatory and I should reproduce them verbatim:

> 8. I strictly deny each and every issue contained at paragraph 8 of Rajaram's Affidavit. The Plaintiff's cause of action against the 2nd to 12th Defendants in this action arises as constructive trustees as explained at paragraph 5 of my 1st Affidavit and substantiated in my 1st Affidavit and the Affidavits thereto. At paragraphs 4 and 5 of my 1st Affidavit, I have set out the Plaintiff's cause of action in these proceedings. A description of the claim against the 1st Defendant is set out at paragraphs 8 to 11 thereof and the claim against the 2nd to 14th Defendants at paragraphs 12 to 15. At paragraphs 16 to 21 of the same, I have set out in considerable detail the circumstances and the factual matrix on which the Plaintiff's claim for Mareva relief is based. Substantial documentation, as has been recovered by the R&M, setting out the payments received by the 1st to 14th Defendants are exhibited to my 1st Affidavit. These payments cannot be referred to any underlying transaction or legitimate purpose of the Plaintiff. This, coupled with the links that can be drawn between the 1st Defendant and the 2nd to 12th Defendants, leads to a strong inference that the entire set of corporate and individual defendants to this action (including the 2nd, 3rd, 4th and 6th Defendants) acted as a kind of network to facilitate payments from the Plaintiff. I am drawing this inference based on documents relating to the Defendants as are available to the R&M and which I have investigated and scrutinized.
>
> 10. I now crave to refer this Honourable Court to paragraph 9 of Rajaram's Affidavit and deny any delay as alleged therein. The delay in instituting these proceedings has been explained in detail at paragraph 6 of my 1st Affidavit which I repeat and adopt. I further state that the Initial Progress Report of 25.9.1998 and the First Progress Report of 26.10.1998, copies of which are now produced and shown to me marked as Exhibits 'KT-1' and 'KT-2' respectively, set out the state of the Plaintiff at the date of these reports, based on the documents and information then available to the R&M. It is however clear from Part B Appendix 1 of the First Progress Report, that substantial sums of money and trade debts could not be accounted for.

To say the least, the case against the defendants was not based on hearsay information but rather on documents and the relevant evidence gathered by the receivers and managers. These pieces of evidences cannot be disputed nor rebutted by the defendants. They were very damning indeed.

It was contended that all the payments were received in the ordinary course of business by each of the 2nd, 3rd, 4th and 6th defendants. The 6th defendant contended that the payments were for consultancy work done by him. With respect, this argument cannot hold water. It was wholly untenable. No evidence at all had been adduced to show that any work had been done or that *bona fide* dealings had been executed by any one of the 2nd, 3rd, 4th and 6th defendants. Exhibit "KT-3" of encl. 23 sets out the delivery orders and invoices and they clearly showed that the second defendant and the plaintiff shared the same fax and telephone numbers. Exhibit "KT-3" of encl. 23 are too voluminous for production in this judgment. The company search reports at exh. "KT-6" of encl. 7 set out in great detail the search reports on the 2nd, 3rd and 4th defendants and I do not propose to reproduce them in this judgment. Suffice for me to say that I have read the search reports and they showed dormant empty shelf companies worth RM2.00 and that no accounts have been filed since its incorporation in 1996. The mere fact that none of the payments was disputed by the plaintiff's shareholders or officers was irrelevant and it cannot justify the payments that were not made legitimately. All these averments had not been rebutted. Paragraphs 12 to 17 of encl. 23 pieced together the story in this fashion:

> 12. I strongly deny paragraph 12 of Rajaram's Affidavit. If, as Rajaram states, the sums received by the 2nd, 3rd, 4th and 6th Defendants were received in the ordinary course of business, then it is incumbent on these parties to adduce evidence of such bona fide business dealings, the nature of such dealings and proof that payments made to these Defendants by the Plaintiff were made for a legitimate commercial purpose. I verily believe that Rajaram's failure to adduce not one scrap of evidence to justify the sums received by the 2nd, 3rd, 4th and 6th Defendants reinforces what I have set out at paragraphs 11 to 15 of my 1st Affidavit and the Exhibits referred to therein and in particular, my allegation that the payments made to these and other Defendants are not referable to any legitimate purpose. I further state that there is no evidence that the outflow of such large sums of money and the discrepancies between the Plaintiff's records and the actual cheque payments were made known to all the directors, shareholders and officers of the Plaintiff. In any event, the fact that no director, shareholder or officer of the Plaintiff disputed these 'purported' transactions (of which I know nothing) does not indicate that they are legitimate and is irrelevant to the Plaintiff's cause of action against the Defendants in this action.
>
> 13. In reply to paragraph 12 of Rajaram's Affidavit, I would also add that based on the latest company search reports set out at Exhibit 'KT-6' of my 1st Affidavit, the 2nd Defendant is a dormant company. This has not been challenged or disputed anywhere in Rajaram's Affidavit. I further take note that the 3rd and 4th Defendants do not have any business address and no evidence of the nature of the business conducted by these Defendants has been adduced by Rajaram.

14. In reply to paragraph 13 of Rajaram's Affidavit, I have no knowledge of any services carried out by Rajaram as a consultant for the Plaintiff or the businesses referred to therein. Once again, Rajaram has failed to adduce any details or particulars of the work carried out by him and the fees attributable to such work, or of his expertise to justify such appointment. There is also no evidence to explain the alleged business dealings referred to at paragraph 13 and Rajaram has refrained from producing any such evidence, which I verily believe, does not exist.

15. In reply to paragraph 15 of Rajaram's Affidavit, there is now produced and shown to me marked as Exhibit 'KT-3' copies of delivery orders and invoices which clearly show that both the 2nd Defendant (which the 6th Defendant claims is a substantial company) and the Plaintiff shared the same telephone and facsimile numbers although they disclose different business addresses.

16. In reply to paragraphs 16 and 17 of Rajaram's Affidavit, I crave to refer to paragraph 11(b) of my 1st Affidavit and Exhibit 'KT-5' thereto which sets out in detail the substantial sums received by the 2nd, 3rd, 4th and 6th Defendants. At paragraphs 12 and 13 of his Affidavit, Rajaram states that payments to these parties were received in the ordinary course of business. I am somewhat surprised that Rajaram now seeks to deny these very invoices and delivery notes set out in my 1st Affidavit. In reply to Rajaram's statement that the procedures relating to the Plaintiff's accounts are questions of its own internal management, this does not answer the Plaintiff's allegation that substantial sums were received by the 2nd, 3rd, 4th and 6th Defendants and that these Defendants were all linked to the Plaintiff or the 1st Defendant such as to lead to the irresistible inference that they knowingly participated in a dishonest network to facilitate payments out of the Plaintiff.

17. In reply to paragraph 18 of Rajaram's Affidavit and the allegation therein that I have not set out the source of my belief, I repeat paragraph 8 above. It is clear from the company search reports on the 2nd, 3rd and 4th Defendants as shown at Exhibit 'KT-6' above that the 2nd Defendant is a dormant company and that the 3rd and 4th Defendants are merely RM2 'off the shelf' companies which are not doing any substantial business and have not filed any annual returns and accounts since their incorporation in 1996. Further, Rajaram has failed to disclose any evidence relating to the 'purported' business and trade of the 2nd, 3rd and 4th Defendants. Based on this, I am drawn to the conclusion that the 2nd, 3rd and 4th Defendants are merely 'shell' companies which are being used merely to siphon out funds belonging to the Plaintiff and that these Defendants, together with the 6th Defendant, knowingly participated in this dishonest scheme.

**The 5th Defendant**

I will now say something about the 5th defendant.

It was argued by the 5th defendant that the monies received by him from the plaintiff were monies received for work and advice rendered by the 5th defendant and for his skill and expertise. The plaintiff's claim against the 5th defendant centred essentially around the payments received by the 5th defendant from the plaintiff. These payments came up to RM875,195.20. The issue here would be whether the 5th defendant, being at all material times a director of the plaintiff, was in law validly entitled to receive and retain those sums. The plaintiff contended that the 5th defendant was not entitled to do so and that the 5th defendant had received those sums of monies in breach of the 5th defendant's fiduciary duties to the plaintiff. That the 5th defendant had received the monies was beyond dispute. Was the 5th defendant really entitled to receive those monies? The 5th defendant purported to justify the payment of RM850,000 by reference to a purported appointment as a consultant for the purpose of listing the plaintiff on the Kuala Lumpur Stock Exchange. But exh. "IAL-5" of encl. 11 – the affidavit of the 5th defendant that was affirmed on 6 September 2001, was of no assistance to the 5th defendant. Exhibit "IAL – 5" of encl. 11 was the minutes of the 95th board of directors' meeting of the plaintiff that was held on 8 August 1996 and the minutes did not record the appointment of the 5th defendant as the consultant of the plaintiff. Exhibit "IAL-5" of encl. 11 merely resolved to appoint a merchant banker and consultant for assistance in listing on the Kuala Lumpur Stock Exchange. The stand of the plaintiff can be seen at para. 19 of encl. 18 which was the affidavit in reply of Kenneth Teh Ah Kiam that was affirmed on 20 September 2001 and it was worded in this way:

> 19. I have no knowledge of the matters stated at paragraph 35 of the 5th Defendant's Affidavit and no evidence of any such decision of the Board of Directors is produced by the 5th Defendant. In any event, I am advised by my solicitors and verily believe that the same cannot justify the substantial payments made out to the 5th Defendant. It is clear from a perusal of Exhibit IAL-5 that no reference is made therein to the appointment of the 5th Defendant nor to the scope of work to be carried out by him.

And at para. 9 of encl. 35 which was also the affidavit in reply of Kenneth Teh Ah Kiam that was affirmed on 18 October 2001, it was averred that:

> 9. I deny paragraphs 9, 10, 11 and 12 of the 5th Defendant's 2nd Affidavit and reply as follows:

9.1 I have no knowledge of the correspondence set out at Exhibit 'IAL-5' and 'IAL-6' of the 5th Defendant's 1st Affidavit in Reply and deny that the same constitutes clear evidence of any sums due and owing to the 5th Defendant. The 5th Defendant was further a director of the Plaintiff and as such, the documents shown at Exhibit 'IAL-5' and 'IAL-6' would, in any event, constitute a clear breach of his fiduciary duties by the 5th Defendant and this will be addressed by counsel before this Honourable Court.

9.2 I deny that the appointment of the 5th Defendant was approved by the Board of Directors and state that any such approval cannot justify the payments made to him. The draft minutes produced by the 5th Defendant make no mention of the 5th Defendant and it is clear from these draft minutes (assuming the same to be true, which is denied) that he was not appointed, nor were the fees claimed by him approved by the Board of Directors.

9.3 Any appointment of the 5th Defendant would have had to be made by the Board of the Plaintiff and not by the 1st Defendant and/or Datuk Haji Ibrahim (who has passed away) as set out in the letter at Exhibit 'IAL-6' of the 5th Defendant's 1st Affidavit.

9.4 I have no knowledge of the alleged skill or experience of the 5th Defendant and it is clear that the 5th Defendant deliberately avoids explaining what expertise or qualifications he possesses or what work he carried out. In his 1st Affidavit, the 5th Defendant states that he was appointed to assist with the listing of the Plaintiff. I am unable to comprehend how the undisclosed 'contacts' and 'connections' referred to at paragraphs 10 and 11 of the 5th Defendant's 2nd Affidavit can assist any such listing.

9.5 I am further advised by my solicitors and verily believe that the payments to the 5th Defendant cannot be justified in law and this will be addressed by counsel before this Honourable Court.

9.6 The documents that the 5th Defendant purports to rely on in justification of the sums paid to him cannot and do not in any way justify the same.

These affidavits when taken together would show that the 5th defendant was not appointed by the 95th board of directors' meeting of the plaintiff as the consultant of the plaintiff.

I now turn once again to encl. 11. The 5th defendant relied heavily on exh. "IAL-6" of encl. 11 and I must reproduce it forthwith:

I.A. Lamach
135-B, 2nd Floor
Jalan Maharajalela
50150 Kuala Lumpur

7th Nov. 1996

Board of Directors
Pharmmalaysia Berhad
69, Medan Setia 1
Bukit Damansara
50490 Kuala Lumpur

Kind Attn: DATUK HAJI IBRAHIM – CHAIRMAN

Dear Datuk,

**RE: SPECIAL CONSULTANT FOR LISTING PURPOSE**

I refer to the above. I wish to record my deepest appreciation to Datuk and the Board for asking me to look into the listing of Pharmmalaysia Berhad in line with the Board objectives.

I have spoken to Mr. Dinesh Patel and have informed him of my terms and conditions.

Datuk, please note that Pharmmalaysia Berhad will have to pay me fees of RM2 million. The initial amount of RM 1 million is to be paid to me by end January 1997 and the balance upon listing. The initial amount of RM 1 million is non refundable. Mr. Dinesh has agreed to my terms and conditions.

I look forward to working closely with Datuk and Mr. Dinesh in listing Pharmmalaysia Berhad on the KLSE.

Thanking you.
Yours sincerely,
Sgd (Illegible).
I.A. Lamach

c.c. Mr. Dinesh Patel – Managing Director.

The 5th defendant also relied heavily on exh. "IAL-7" of encl. 11 and it was worded in this way:

PHARMMALAYSIA BERHAD
Head & Marketing Office:
No. 69 & 71, Medan Setia 1, Bukit Damansara, 50490 Kuala Lumpur, MALAYSIA
Tel: (03) 2553166 (4 lines) Fax: (03) 2554971
Factory & Admin. Office

Lot No. 24, Bakar Arang Industrial Estate, 08000 Sungai Petani, Kedah Darulaman, MALAYSIA

Tel: (04) 4213011 (4 lines) Telex: MAXIIN MA 42225; Cable: MAXIPLEX Fax: (04) 4215731

24th Jan. 1997

I.A. Lamach
135-B, 2nd Floor
Jalan Maharajalela
50150 Kuala Lumpur

Dear Sir,

**RE: PART PAYMENT OF CONSULTANT FEES**

Enclosed please find our MBB cheque No. 076499 dated 24th January 1997 for the amount of RM850,000.00 being part payment towards consultation fees.

Yours sincerely

PHARMMALAYSIA BERHAD
Sgd (Illegible).
Managing Director

c.c. Datuk Haji Ibrahim

The plaintiff took exceptions to these two letters – referring to exhs. "IAL-6" and "IAL-7" of encl. 11. It was contended on behalf of the plaintiff that the appointment of the 5th defendant as the consultant was not only contrary to law but it was also contrary to the Memorandum and Articles of Association of the plaintiff and it was also in clear breach of the fiduciary duties owed to the plaintiff by its directors.

The 5th defendant sought to justify the payment of RM850,000 made to him by virtue of art. 111(2) of the Articles of Association of the plaintiff which provides that:

111.

(2) If by arrangement with the director, any director shall perform or render any special duties or services outside his ordinary duties as a director in particular without limiting to the generality of the foregoing if any director being willing shall be called upon to perform extra services or to make any special exertions in going or residing away from his usual place of business or residence for any of the purposes of the company or in giving special attention to the business of the company as a member of a committee of directors, the directors may pay him special remuneration, in addition to his director's fees, and such special remuneration may be by way of a fixed sum, or otherwise as may be arranged.

With respect, in construing art. 111(2) of the Articles of Association of the plaintiff it is important to differentiate and draw a distinction between:

(a) the normal remuneration of a director in relation to the office of director which requires disclosure to and approval of the company at a general meeting under art. 110 of the Articles of Association of the plaintiff which reads as follows:

> 110. The fees of the directors shall be such fixed sum as shall from time to time be determined by an ordinary resolution of the Company and shall (unless such resolution otherwise provided) be divisible among the directors as they may agree, or failing agreement, equally, except that any director who shall hold office for part only of the period in respect of which such fees are payable shall be entitled only to rank in such division for a proportion of the fees related to the period during which he has held office Provided Always that:
>
> (a) fees payable to non-executive directors shall be by a fixed sum, and not by a commission on or percentage of profits or turnover;
>
> (b) salaries payable to executive directors may not include a commission on or percentage of turnover;
>
> (c) fees payable to directors shall not be increased except pursuant to a resolution passed at a general meeting, where notice of the proposed increase has been given in the notice convening the meeting;
>
> (d) any fee paid to an alternate director shall be agreed upon between himself and the director nominating him and shall be paid out of the remuneration of the latter.

(b) and the special remuneration of a director who performs services outside the scope of ordinary duties of a director which must be determined by the directors under art. 111(2) of the Articles of Association of the plaintiff.

Now, art. 111(2) of the Articles of Association of the plaintiff requires that such special remuneration to be approved by the directors – which means nothing short of the Board of Directors acting collectively as a Board.

It must be emphasised that the Board of Directors must act collectively. The power of directors to manage the company is a power that is exercised by the directors acting together as a Board. Decisions taken by the Board of Directors, which is an organ of the company, will bind the company provided that the Board of Directors follow the procedures for board meetings as set out in the company's constitution or the replaceable rules. A director acting on his or her own generally has no authority to bind the company unless the constitution specifically gives an individual director that authority, or the person concerned is a director of a one-person company.

The company director, whether executive or non-executive, will owe fiduciary duties to the company. The fiduciary duties of a company director may be itemised as follows:

(1) duty of loyalty;

(2) duty to act for a proper purpose;

(3) the duty to comply with the no-conflict and no-profit rules;

(4) the duty to act in accordance with the company's constitution; and

(5) the duty to deal fairly as between different classes of shareholders.

It is not uncommon to see that a director who enters into a transaction with the company will find himself in a tight spot. The director must be very careful otherwise he will find that the contract is liable to be set aside even if the terms are considered fair (*Aberdeen Railway v. Blaikie* [1854] 1 Macq. HL 461 (Scotland)). The principle applies not only to transactions directly with the directors but also to those situations where the directors are interested, whether they benefit personally or otherwise (*Transvaal Lands Co. v. New Belgium (Transvaal) Land and Devt Co* [1914] 2 Ch. 488, CA; and *Boulting v. ACTAT* [1963] 2 QB 606, 635-638, CA). In the absence of any express provision in the Articles of Association, the best and the most effective way for a director to protect himself is by making full disclosure to the members of the company and, at the same time, to have the contract entered into or ratified by the company in a general meeting. In the context of the present case, there was no contract between the 5th defendant and the plaintiff pertaining to the purported fees of RM2 million payable to the 5th defendant by the plaintiff for the listing of the plaintiff on the Kuala Lumpur Stock Exchange and neither was there such a contract between the same parties for the part payment of RM850,000 to the 5th defendant. No ratifications by the plaintiff's company at the general meeting were shown to have been made. In fact, there was none. Kenneth Teh Ah Kiam's affidavit in reply in encl. 18 at para. 20 puts the matter to rest. It was worded in this way:

> 20. I now crave to refer to paragraphs 36 and 38 of the 5th Defendant's Affidavit. I am advised by my solicitors and verily believe that the appointment of the 5th Defendant as a consultant was made contrary to law, contrary to the Memorandum and Articles of Association of the Plaintiff and in clear breach of the fiduciary duties owed to the Plaintiff by its directors (including the 5th Defendant). Further, the 5th Defendant has not explained what was the nature of the work to be carried out by him or justified what consultation work he carried out to justify the payment of RM 850,000.00 to him or explained his expertise for such an appointment. I verily believe that no declaration of the 5th Defendant's interest or his appointment as a consultant has been made to the Plaintiff's Annual General Meeting.

The 1st defendant and the late Datuk Haji Ibrahim had no authority at all to support the 5th defendant as alleged. Only the Board of Directors of the plaintiff has the legal mandate to appoint the 5th defendant and there was no evidence that the Board of Directors of the plaintiff has appointed the 5th defendant for the purpose as alleged.

It is a correct statement of the law to say that directors have some of the attributes of trustees especially in regard to the assets of the company which are in their hands or under their control generally (*Russell v. Wakefield Waterworks Co* [1875] LR 20 Eq 474 at 479; *Re Forest of Dean Coal Mining Co* [1879] 10 Ch D 450 at 453; *Re Lands Allotment Co* [1894] 1 Ch 616 at 631, 638, CA; *Karak Rubber Co. Ltd v. Burden (No 2)* [1974] 1 WLR 602 at 633; *Belmont Finance Corp Ltd v. Williams Furniture Ltd* [1979] Ch 250; *Re International Vending Machines Pty Ltd* [1962] NSWR 1408, SC (NSW); *JJ Harrison (Properties) Ltd v. Harrison* [2002] 1 BCLC 162, [2001] 1 All ER (D) 160, (Oct), CA; and *Mulkana Corpn NL v. Bank of New South Wales* [1983] 8 ACLR 278, SC (NSW)). Even *de facto* directors are regarded as trustees of the company assets under their watchful control (*Tintin Exploration Syndicate Ltd v. Sandys* [1947] 177 LT 412). Ungoed Thomas J in *Selangor United Rubber Estates Ltd v. Cradock (No 2)* [1968] 1 WLR 1555 at 1575 aptly said:

> However much the company's purposes and the directors' duties, powers and functions may differ from the purposes of a strict settlement and the duties, powers and functions of its trustees, the directors and such trustees have this indisputably in common – that the property in their hands or under their control must be applied for the specified purposes of the company or the settlement.

Now, the law imposes very strict requirements in relation to the remuneration of directors. This strict rule arises from the fact that the director is a fiduciary and he is akin to a trustee who cannot profit from the trust and he must not put himself in a position of conflict of interest. Lord Cranworth, LC speaking for the House of Lords in *Aberdeen Rail. Co. v. Blaikie Brothers* [1843-60] All ER Rep. 249, 252-253 HL with a coram of Lord Cranworth, LC, and Lord Broughman – as alluded to earlier with the citation of *Aberdeen Railway v. Blaikie* [1854] 1 Macq. HL 461 (Scotland), aptly said:

> The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those

> whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui que trust which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

In *George Bray v. John Rawlinson Ford* [1896] AC 44, a decision of the House of Lords with a coram of Lord Halsbury LC, Lord Watson, Lord Herschell, and Lord Shand, the court had occasion to consider the issue of a person's fiduciary position. Speaking for the House of Lords, and writing a separate judgment, Lord Herschell had this to say at p. 51 to p. 52 of the report:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.

And applying these two salient authorities, I am of the view that any relaxation of the traditional strict rules of equity must be contained and set out in the Articles of Association. In the instant case, art. 111(2) of the Articles of Association of the plaintiff would be the right Article to refer to. I am not inclined to construe art. 111(2) of the Articles of Association of the plaintiff in a light manner. I prefer that strict compliance with art. 111(2) of the Articles of Association of the plaintiff should be adhered to in determining the remuneration payable to directors. For this purpose, reference to the case of *Guinness Plc. v. Saunders* [1990] 2 AC 663, HL should be referred to. There Lord Templeman writing for the House of Lords at p. 692 had this to say:

> Equity forbids a trustee to make a profit out of his trust. The articles of association of Guinness relax the strict rule of equity to the extent of enabling a director to make a profit provided that the board of directors contracts on behalf of Guinness for the payment of special remuneration or decides to award special remuneration. Mr. Ward did not obtain a contract or a grant from the board of directors. Equity has no power to relax its own strict rule further than

and inconsistently with the express relaxation contained in the articles of association. A shareholder is entitled to compliance with articles. A director accepts office subject to and with the benefit of the provisions of the articles relating to directors.

It is not easy to set out the general rules and principles pertaining to the remuneration of directors. I am, however, fortunate to have with me *Palmer's Company Law*, vol. 2 which serves as a good reference book. There the learned authors summarised the law in this way:

(a) that "*prima facie*, directors of a company cannot claim remuneration, but the articles usually provide expressly for payment of it" (see para. 8.038 at p. 8034 of *Palmer's Company Law*).

It is ideal also to refer to the case of *In re George Newman & Co* [1895] 1 Ch. 674, a decision of the Court of Appeal with a coram of Lord Halsbury, Lindley LJ, and AL Smith LJ. In that case, Lindley LJ delivering the judgment of the Court of Appeal aptly said at p. 686 to p. 687 of the report:

> Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorise such presents as those impeached by the liquidator; and the

result is that his appeal must be allowed as to 3000 pounds, part of the 10,000 pounds, and as to the 3500 pounds, Mr. Newman must be ordered to pay these sums, with interest at 4 per cent. He ought also to pay the costs of the appeal and the costs of the summons, except so far as they have been increased by the claims to the 2500 pounds and to the 7000 pounds, part of the 10,000 pounds. The costs occasioned by these claims ought to be allowed and be set off against those which he is ordered to pay.

(b) that "where this is the case, the provision operates as an authority to the director to pay remuneration out of the funds of the company" (see para. 8.038 at p. 8034 of *Palmer's Company Law*).

In this context, it is also ideal to refer to the case of *Hutton v. West Cork Railway Company* [1883] 23 Ch. D 654, a decision of the Court of Appeal with a coram of Cotton LJ, Bowen LJ, and Baggallay LJ. Writing a separate judgment, Bowen LJ had this to say at p. 672 of the report:

A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director, that he is to have a right to be paid for it. In some companies, not in railway companies, perhaps, so often as in other companies, but in some companies, there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity, as was pointed out in the case cited by *Mr. Cookson of Dunston v. Imperial Gas Light and Coke Company* 3 B. & Ad. 125. Directors, under those circumstances, often do get money. But whenever they get it it is in the nature of a gratuity voted.

(c) that "the amount of remuneration to be paid to directors is a matter of internal management. It is not subject to a requirement of reasonableness, provided the payment is a genuine exercise of the company's power to remunerate its directors" (see para. 8.038 at p. 8034 of *Palmer's Company Law*).

(d) that "Articles commonly provide that the directors shall be entitled to such remuneration as shall be voted to them in general meeting, in which case there must be a resolution duly passed by the company" (see para. 8.039 at p. 8035 of *Palmer's Company Law*).

In the context of the present case, the fees of the directors are set out in art. 110 of the Articles of Association of the plaintiff and this article has been reproduced earlier.

(e) that "the articles will also usually authorise the payment by the directors to one of their number of extra remuneration for special services" (see para. 8.040 at p. 8035 of *Palmer's Company Law*).

In the context of the present case, this has been provided for in art. 111(2) of the Articles of Association of the plaintiff and this must be construed strictly.

(f) that "where such provision is made, it is a condition precedent to a director's claim for additional remuneration that the board of directors shall determine the method and amount of the extra payment, it is irrelevant that the director has performed substantial extra services and the payment of additional remuneration would be reasonable" (*Nelberg v. Woking Shipping Co. Ltd.* [1958] 2 Lloyd's Rep. 560 – see para. 8.040 at p. 8035 spilling over to p. 8036 of *Palmer's Company Law*).

(g) that "the correct procedure laid down in the articles for the authorisation of extra remuneration must be followed. If it is not, any contract will be void for want of authority, and the normal equitable rule that a director may not, without shareholder approval, profit from his office will apply" (*Maris Ltd v. Mitchell* 2000 G.W.D. 16-639 (Sh. Ct.) – see p. 8036 of *Palmer's Company Law*).

(h) that "for this reason the court will not allow remuneration to be assessed on a quantum meruit basis and will be extremely reluctant to permit an equitable allowance in an action by the company to recover money paid over without proper authority" (*Guinness Plc v. Saunders* [1990] 2 AC 663 – see p. 8036 of *Palmer's Company Law*).

At this juncture, I should state briefly the facts of the case of *Guinness Plc. v. Saunders (supra)*. In that case, a director by the name of Mr. Ward claimed special remuneration for services rendered to Guinness in connection with the take over of the distillers. The payment was approved by a committee of the Board of Directors but the relevant articles provided that the directors had to approve such special remuneration. The House of Lords held that the Board had to collectively approve the payment and that even if there was a general power to delegate authority to a committee of the Board, in the case of special remuneration, the power to delegate was inapplicable as the articles provided expressly that the Board as a whole had to approve the payment. Mr. Ward then claimed for quantum meruit. Lord Templeman writing a separate judgment for the House of Lords aptly said at p. 692 of the report:

> At the board meeting held on 19 January 1986, Mr. Ward was present but he did not seek then or thereafter to obtain the necessary authority of the board of directors for payment of special remuneration. In these circumstances there are no grounds for equity to relax its rules further than the articles of association provide. Similarly, the law will not imply a contract between Guinness and Mr. Ward for remuneration on a quantum meruit basis awarded by the court when the articles of association of Guinness stipulate that special remuneration for a director can only be awarded by the board.

I will now refer to the case of *In re Richmond Gate Property Co. Ltd.* [1965] 1 WLR 336. That was a case where art. 108 of the company's articles stipulated that the remuneration of the managing director was to be determined by the Board and was to be of such amount as to be determined by the Board. Plowman J, at p. 337 of the report, in his judgment said:

> … in other words, the managing director is at the mercy of the board, he gets what they determine to pay him, and if they do not determine to pay him anything he does not get anything. That is his contract with the company, and those are the terms on which he accepts office.
>
> Since there is an express contract with the company in regard to the payment of remuneration it seems to me that any question of quantum meruit is automatically excluded.

Continuing at p. 338 of the report, Plowman J had this to say:

> In the present case there was an express contract which relates to payment of remuneration, and the only question with which I am concerned is: according to the terms of that express contract, is any sum payable for remuneration? When one finds that the express contract is that the remuneration payable is such sum as the directors may determine that the managing director shall have, and that the directors have not determined that any sum is to be payable to the managing director, it seems to me to follow as a necessary consequence that no remuneration can be claimed.

(i) that "to take remuneration in excess of what is payable under the regulations is a misfeasance, and directors who are parties to such payments are jointly and severally liable to make good the amount" (*Re Oxford, etc., Society* [1886] 35 Ch. D 502; *Leeds Estate, etc., Co. v. Shepherd* [1887] 36 Ch. D 787, 809; and *Re Whitehall Court* [1887] 56 LT 280 – see para. 8.043 at p. 8037 of *Palmer's Company Law*).

I pause here for a moment. This is indeed a long judgment. I will now proceed further.

Now, reverting back to the case of *Guinness Plc. v. Saunders (supra)*, I must categorically say that that was the leading decision from the House of Lords in regard to the law governing the directors' remuneration. I should be forgiven if I were to refer to that case once again. There the House of Lords had to consider the validity of a payment made by Guinness to Mr. Ward – a director of Guinness. The payment of 5.2 million pounds was approved by a committee of the Board of Directors. It had not been approved, confirmed or ratified by the Board of Directors of Guinness. The payment was set aside for want of authorisation and approval and Mr. Ward had to make restitution of the payment received. The House of Lords held that under art. 91 of Guinness Articles, only the Board of Directors could award special remuneration to a director. A committee or a single director could not.

Article 91 of the Articles of Association of Guinness empowered the Board of Directors to determine and award additional remuneration to any director who performed services outside the ordinary scope of his duties as a director. Such additional remuneration had to be determined by the Board of Directors and not any committee empowered to do so by the Board. At p. 686 of the report, Lord Templeman aptly said:

> A committee, which may consist of only two or, as in the present case, three members, however honest and conscientious, cannot assess impartially the value of its work or the value of the contribution of its individual members.

And further down the same page, his Lordship Lord Templeman said:

> Article 91 authorises the board, and only the board, to grant special remuneration to a director who serves on a committee.

In interpreting art. 91 judicially, Lord Templeman at p. 687 of the report, in style, said:

> The result of applying the article 2 definition to article 91, it is said, is that a committee may grant special remuneration to any director who serves on a committee or devotes special attention to the business of the company or who otherwise performs services which in the opinion of the committee are outside the scope of the ordinary duties of a director. In my opinion the subject and context of article 91 are inconsistent with the expression `the board' in article 91 meaning anything except the board. Article 91 draws a contrast between the board and a committee of the board. The board is expressly authorised to grant special remuneration to any director who serves on any committee. It cannot have been intended that any committee should be able to grant special remuneration to any director, whether a member of the committee or not. The board must compare the work of an individual director with the ordinary duties of a director. The board must decide whether special remuneration shall be paid in addition to or in substitution for the annual remuneration determined by the board under article 90. These decisions could only be made by the board

> surveying the work and remuneration of each and every director. Article 91 also provides for the board to decide whether special remuneration should take the form of participation in profits; the article could not intend that a committee should be able to determine whether profits should accrue to the shareholders' funds or be paid out to an individual director. The remuneration of directors concerns all the members of the board and all the shareholders of Guinness. Article 2 does not operate to produce a result which is inconsistent with the language, the subject and the context of article 91. Only the board possessed power to award 5.2m pounds to Mr. Ward.

Now, the House of Lords in *Guinness Plc v. Saunders (supra)* held that as a director was a fiduciary of the company, he could only claim such remuneration as was expressly authorised by the articles. The House of Lords also held that the receipt of any payment that was not so authorised by the articles and received in the manner prescribed in the articles amounted to a breach of fiduciary duty.

I am of the considered view that art. 111(2) of the Articles of Association of the plaintiff here is similar in substance to art. 91 of the Articles of Association of Guinness. The wordings of art. 91 of the Articles of Association of Guinness can be seen at p. 686 of the judgment of Lord Templeman and it was worded like this:

> 91. The board may, in addition to the remuneration authorised in article 90, grant special remuneration to any director who serves on any committee or who devotes special attention to the business of the company or who otherwise performs services which in the opinion of the board are outside the scope of the ordinary duties of a director. Such special remuneration may be made payable to such director in addition to or in substitution for his ordinary remuneration as a director, and may be made payable by a lump sum or by way of salary, or commission or participation in profits, or by any or all of those modes or otherwise as the board may determine.

Article 111(2) of the Articles of Association of the plaintiff has been reproduced earlier and under it only the directors of the plaintiff may approve remuneration for services outside the scope of the ordinary duties of a director. The House of Lords in Guinness made it abundantly clear that strict compliance was expected without exception. Article 2 of the Articles of Association of the plaintiff made it clear that "Directors" would refer to "all the directors". I must hold for the reasons as set out in the preceding paragraphs of this judgment that the purported appointment of the 5th defendant as a consultant was wholly contrary to the Articles of Association of the plaintiff. There was no valid resolution authorising the appointment of the 5th defendant as the consultant for the purposes mentioned by the 5th defendant. Neither was there any form of authorisation from the Board of Directors that the 5th defendant be paid a sum of RM850,000.

Since neither the 5th defendant's purported engagement as a consultant nor the receipt by him of the sum of RM850,000 was validly authorised under the plaintiff's Articles of Association, it was therefore totally irrelevant whether or not the same was approved or corroborated by either (i) the first defendant as the plaintiff's managing director or (ii) by the Chairman in the person of Datuk Hj Ibrahim as alleged. With respect, neither of these persons had any power at all under the plaintiff's Articles of Association to authorise or approve the sums of money received by the 5th defendant which were, in fact, received in clear breach of their fiduciary duties.

**The 9th Defendant**

The pre-requisites for the grant of a mareva injunction are lucidly set out by Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors (supra)* and I have reproduced them in the early part of this judgment. It cannot be denied that the plaintiff fulfilled all the pre-requisites for the grant of a mareva injunction. The plaintiff has a good arguable case against the 9th defendant in respect of the relief claimed in these proceedings. The 9th defendant is a Malaysian resident. It was not disputed that the 9th defendant received a sum of RM40,000 from the plaintiff. These are indeed assets belonging to the plaintiff which are in the possession of the 9th defendant and which are the subject matter of the proposed mareva relief against the 9th defendant. So, it can be surmised that there are assets within jurisdiction.

In the affidavit in reply of Kenneth Teh Ah Kiam that was affirmed on 25 September 2001 as seen in encl. 22, the averments at paras. 13 and 16 should be referred to. At para. 13 it was averred as follows:

> 13. I deny paragraphs 13 and 14 of the Defendant's Affidavit and repeat paragraph 10 above. I further state that;
>
> 13.1 The 9th Defendant was the Finance and Administration Manager of the Plaintiff and was in charge of the operation of the Plaintiff's accounts. The 9th Defendant was also one of the authorised signatories of the Plaintiff's accounts. As such, it was her responsibility to ensure adequate control and proper accounting of the funds of the Plaintiff;
>
> 13.2 Set out at paragraph 11(a) and Exhibit 'KT-2' of my 1st Affidavit are substantial payments amounting to RM 2,068,119.11 paid to the 1st Defendant or to third parties on his account or for his benefit. These payments were all authorised and signed by the 9th Defendant, who has deliberately avoided explaining what exactly these sums were made for;

13.3 Set out at paragraph 11(b) and Exhibit 'KT-5' of my 1st Affidavit are substantial payments made to the 2nd to 14th Defendants. Again these were authorised and co-signed by the 9th Defendant who again deliberately avoids explaining what these payments were made for;

13.4 At Appendix 7 and pages 298 to 325 of Exhibit 'KT-5' set out are substantial payments made to the 2nd Defendant. These were again authorised or co-signed by the 9th Defendant. The 9th Defendant was at all times a shareholder of the 2nd Defendant. Again the 9th Defendant has deliberately evaded explaining what these large sums were in account of;

13.5 At Appendix 13 and pages 405 to 406 of Exhibit 'KT-5' are again set out payments made to the 9th Defendant. The 9th Defendant has not explained why the sums of RM 25,000.00 and RM 5,000 were paid out to her and also why the sum of RM 10,000, allegedly paid out as a bonus, was recorded in the books of the Company as being paid out to Pharmtrade, given that she was the Finance and Administration Manager at the material time and was responsible for the recording and keeping of the books and accounts of the Plaintiff;

13.6 All payments authorized and signed by the 9th Defendant, as set out above and at Exhibit 'KT-5' are not referable to, and cannot be put down to any legitimate purpose of the Plaintiff. The failure of the 9th Defendant, as the Administration and Finance Manager, to explain these payments, which are or should have been within her direct knowledge, reinforces my statement at paragraph 7 of my 1st Affidavit that the 9th Defendant dishonestly assisted the 1st Defendant in breaching his fiduciary duties owed to the plaintiff in connection with such payments and/or knowingly received monies paid out in breach of such duties.

While the averments at para. 16 read as follows:

16. In reply to paragraph 17 of the 9th Defendant's Affidavit and the reference to paragraphs 47 to 49 of the 5th Defendant's Affidavit, I repeat paragraph 26 of my Affidavit in Reply to the 5th Defendant's Affidavit. I further state that;

16.1 The allegation that there is no cause of action against the 9th Defendant is baseless, as set out at paragraph 10 above;

16.2 I again repeat paragraph 10 above and reiterate that in the circumstances, given the nature of the payments made out by and to the 9th Defendant and her obstinate refusal to justify or explain the same, there is every risk that the 9th Defendant will dissipate the monies received by her if the relief sought herein is refused.

The facts as set out in paras. 13 and 16 of encl. 22 posed a real and serious danger that the 9th defendant would dissipate any assets in her possession in order to defeat any judgment in favour of the plaintiff. This was not a mere speculation but rather it was based on very clear and compelling evidence. The nature and participation of the 9th defendant in the dishonest scheme constituted evidence of a serious risk of dissipation of assets to defeat judgment. It must be borne in mind that much of the information relating to the books and accounts of the plaintiff, which were in the plaintiff's computers, were deleted before the appointment of the receivers and managers in order to conceal further evidence of dissipation of the plaintiff's assets. In this context, para. 11 of encl. 22 bears repetition:

> 11. I deny paragraph 10 of the 9th Defendant's Affidavit. It was the function of the R&M to take control of the documents and other financial records of the Plaintiff upon their appointment. As set out at paragraph 6 of my 1st Affidavit, information from the Plaintiff's computers had also been deleted prior to the appointment of the R&M and in order to prevent the removal of any further information and documents from the Plaintiff, sufficient precautionary measures had to be taken.

And para. 6 of encl. 7 too bears repetition:

> **The Genesis of this Application**
>
> 6. Following their appointment, the R&M took possession of whatever books, registers and accounting records of the Plaintiff that could be located at the premises of the Plaintiff. One of the things the R&M noted was that the records of the Plaintiff prior to 1996 were missing and could not be located at any of the premises of the Plaintiff. The R&M and their staff examined the information contained in the said books and accounting records of the Plaintiff. They sought to verify the information and the entries contained in the said books and accounting records. It took a considerable amount of time to examine and make sense of the accounting entries and to trace all primary documentation in support of such entries. However, much of the information simply could not be reconciled or explained just by reference to the entries themselves and there were numerous discrepancies. Hence, the R&M had to commence an investigation into the financial affairs of the Plaintiff for a period of 3 years prior to their appointment. The investigation was hampered by the failure of the directors of the company to hand over all relevant records of the company, and by their failure to cooperate with the R&M in furnishing the statement of affairs required pursuant to the Companies Act 1965 ('the Act'). The R&M also discovered from a member of the staff of the Plaintiff, one Cik Salmah bte Ismail that some information stored in computers was deleted upon the appointment of the R&M. Because of the state of the company's records, steps were taken to verify

> information with third parties. Many third parties did not respond or cooperate. Much information was obtained from various financial institutions. It took a considerable amount of time to obtain the information and the underlying documents from such institutions. Annexed hereto and marked as exhibit bundle 'KT-3' are all written requests for cooperation and information by the R&M and their staff. Apart from such written requests, there were also verbal requests. Further, the R&M also requested for information from the previous auditors of the Plaintiff, Kassim Chan & Co., but the previous auditors did not respond to any of the R&M's requests.

The plaintiff's cause of action against the 9th defendant has been explained in paras. 4 and 5 of encl. 7 which have been reproduced earlier. Suffice for me to say that encl. 7 sets out in considerable detail the circumstances and the factual matrix on which the plaintiff's claim for mareva relief was based and it also showed the linkage between the first defendant and the 9th defendant.

I must reiterate the following:

(a) The 9th defendant was the finance and administration manager of the plaintiff and she was in charge of the plaintiff's accounts.

(b) The 9th defendant was also one of the authorised signatories of the plaintiff's accounts.

(c) That substantial payments were made to the first defendant and it came to a staggering figure of RM2,068,119.11 and all these were authorised or co-signed by the 9th defendant who has avoided explanation of these sums.

(d) Amounts paid to the 2nd defendant right up to the 14th defendant and these amounts were authorised and signed by the 9th defendant as set out at para. 11 of encl. 7 which was worded as follows:

> 11. The 1st Defendant breached those duties by causing, permitting or procuring the Plaintiff to make various payments to himself, to third parties on his account or for his benefit, and to the 2nd to 14th Defendants. The said payments were not in the ordinary course of the Plaintiff's business. The payments were not referable to, and could not be put down to, any legitimate purpose of the Plaintiff. There was no benefit derived by the Plaintiff from such payments. The net result is that there was a substantial outflow of monies from the Plaintiff's accounts to the 1st to 14th Defendants. The payments can be categorised as follows:

(a) An amount totalling RM2,068,119.11 was paid to the 1st Defendant or to third parties on his account or for his benefit, as particularised in Appendixes 1 to 6 to the Statement of Claim herein. Annexed hereto and marked collectively as exhibit bundle 'KT-4' are the underlying documents, duly indexed, evidencing the payments.

(b) Various amounts totalling RM17,052,128.98 were paid to the 2nd to 14th Defendants, as particularised in Appendixes 7 to 13 to the Statement of Claim. Annexed hereto and marked collectively as exhibit bundle 'KT-5' are the underlying documents, duly indexed, evidencing the payments.

And, at Appendix 7 of exh. "KT5" of encl. 7 at p. 298 to p. 325, certain sums of monies were itemised and these sums were paid, *inter alia*, to the 2nd defendant – a dormant company, and such payments were authorised or co-signed by the 9th defendant. It must be borne in mind that the 9th defendant was a shareholder of the second defendant. The 9th defendant saw it fit not to give an explanation as regards these sums. It would be ideal to reproduce Appendix 7 of exh. "KT-5" of encl. 7 at p. 298 and I shall do so now:

Appendix 7

| Date | Bank | Cheque No. | Payee on Cheques | Payee in Books | Sum (RM) | Additional Info from source documents | Bank-in through |
|---|---|---|---|---|---|---|---|
| 15-1-96 | MBB | 000307 | Entigma Sdn Bhd | Pharmtrade | 50,000.00 | PBB 81-29-00536-0 | PBB, Bangsar, KL (33-14173) |
| 26-1-96 | MBB | 010283 | Entigma Sdn Bhd | Pharmtrade | 39,000.00 | No infoma-tion sighted | PBB, Bukit Damansara, KL (33-14146) |
| 7-3-96 | MBB | 016941 | Entigma Sdn Bhd | Meadow Quest | 20,000.00 | Entigma Sdn Bhd A/C 1088009896 | SBB, Jalan Sultan Ismail, KL (34-14130) |
| 10-5-96 | MBB | 049196 | Entigma Sdn Bhd | Meadow Quest | 75,000.00 | Entigma Sdn Bhd A/C 1088009896 | SBB, Seksyen 14, PJ (34-12079) |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 4-12-96 | SBB | 189448 | Entigma Sdn Bhd | Pharmtrade | 100,000.00 | No information sighted | SBB, Jalan Sultan Ismail, KL (34-14130) |
| 13-12-96 | MBB | 111055 | Entigma Sdn Bhd | Pharmtrade | 900,000.00 | Entigma Sdn Bhd A/C 3088545415 | PBB, Bangsar, KL (33-14173) |
| 16-12-96 | BBMB | 575169 | Entigma Sdn Bhd | Not found (unrecorded) | 985,000.00 | SBB | SBB, Seksyen 14, PJ (34-12079) |
| 27-12-96 | SBB | 147004 | Entigma Sdn Bhd | Not found (unrecorded) | 120,000.00 | Entigma Sdn Bhd A/C 3088545415 | Unidentifi-Able |
| 7-3-97 | SBB | 159513 | Entigma Sdn Bhd | Entigma Sdn Bhd | 150,000.00 | Entigma Sdn Bhd A/C 1088009896 | SBB, Jalan Sultan Ismail, KL 34-14130) |
| 11-3-97 | SBB | 159514 | Entigma Sdn Bhd | Entigma Sdn Bhd | 120,000.00 | No information sighted | PBB, Bukit Damansara, KL (33-14146) |
| 15-4-97 | MBB | 405584 | Entigma Sdn Bhd | Entigma Sdn Bhd | 20,000.00 A/C 1007003 2858 | Bank Utama | Bank Utama Main Branch, Bumi Raya, Jalan Raja Laut (11-14016) |
| 22-5-97 | SBB | 174557 | Entigma Sdn Bhd | Entigma Sdn Bhd | 50,000.00 | No information sighted | Bank Utama, Damansara Utama, (11-14025) |
| 16-6-97 | PAB | 392651 | Entigma Sdn Bhd | Entigma Sdn Bhd | 300,000.00 | Entigma Sdn Bhd A/C 0120062468 | AMBB Main Branch (08-14010) |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 20-6-97 | PAB | 392655 | Entigma Sdn Bhd | Entigma Sdn Bhd | 400,000.00 | Bank Utama A/C 0070032858 | Bank Utama, Damansara Utama (11-14025) |
| 25-6-97 | PAB | 392659 | Entigma Sdn Bhd | Entigma Sdn Bhd | 200,000.00 | Entigma Sdn Bhd A/C 3088545415 | PBB, Bangsar, KL (33-14173) |
| 22-8-97 | PAB | 427565 | Entigma Sdn Bhd | Entigma Sdn Bhd | 250,000.00 | Entigma Sdn Bhd A/C 0120062468 | AMBB Main Branch (08-14010) |
| 20-10-97 | MBB | 476239 | Entigma Sdn Bhd | Entigma Sdn Bhd | 200,000.00 | Entigma Sdn Bhd A/C 1088009896 | SBB, Taman Tun Dr Ismail, KL (34-14091) |
| 5-11-97 | MBB | 643833 | Entigma Sdn Bhd | Entigma Sdn Bhd | 300,000.00 | Entigma Sdn Bhd A/C 3088545415 | PBB, Bukit Damansara, (33-14146) |
| 2-1-98 | PAB | 478523 | Entigma Sdn Bhd | Not found (un-recorded) | 50,000.00 | Bank Utama A/C 0070032858 | Bank Utama, Damansara Utama (11-14025) |
| 8-1-98 | PAB | 478541 | Entigma Sdn Bhd | Entigma Sdn Bhd | 15,000.00 | Entigma Sdn Bhd A/C 3088545415 | PBB, Bangsar, KL (33-14173) |
| 24-2-98 | PAB | 518468 | Entigma Sdn Bhd | Lee Chin On | 25,100.00 | Entigma Sdn Bhd A/C 4800033833 | HLBB (24-14106) |
| 23-3-98 | PAB | 518514 | Entigma Sdn Bhd | Not found (un-recorded) | 30,000.00 | Entigma Sdn Bhd A/C 3073443310 | PBB, Bangsar, KL (33-14173) |
| 24-3-98 | PAB | 518519 | Entigma Sdn Bhd | Not found (un-recorded) | 270,000.00 | Bank Utama A/C 0070032858 | Bank Utama, Damansara Utama (11-14025) |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 31-3-98 | PAB | 518523 | Entigma Sdn Bhd | Not found (un-recorded) | 20,000.00 | Entigma Sdn Bhd A/C 1088009896 | SBB, Jalan Sultan Ismail, KL (34-14130) |
| 7-5-98 | MBB | 918054 | Entigma Sdn Bhd | Not found (un-recorded) | 60,000.00 | Entigma Sdn Bhd A/C 0120062468 | AMBB Main Branch (08-14010) |
| 24-8-98 | SBB | 167509 | Entigma Sdn Bhd | Not found (un-recorded) | 250,000.00 | Entigma Sdn Bhd A/C 3088545415 | PBB, Bangsar, KL (33-14173) |
| 8-9-98 | MBB | 926190 | Entigma Sdn Bhd | Not found (un-recorded) | 400,000.00 | Entigma Sdn Bhd A/C 3088545415 | PBB, Bangsar, KL (33-14173) |

TOTAL 5,399,100.00
==========

(e) As the then finance and administration manager of the plaintiff, the 9th defendant should have verified the payments as alluded to above. The fact of the matter was this. That in breach of her duties to the plaintiff and her responsibilities to ensure adequate control and proper accounting of the funds of the plaintiff, the 9th defendant permitted the sums as alluded to above to be unlawfully disbursed. The 9th defendant could have explained what these sums were meant for but she chose not to.

(f) That there were payments received by the 9th defendant as set out at Appendix 13 of p. 405 to p. 406 of exh. "KT-5" of encl. 7 that was worded like this (referring to what appeared at p. 405 only):

**Appendix 13**

**PHARMMALAYSIA BERHAD**
**(Receivers and Managers Appointed)**

**Payment made to Kaladolley Pereira**
**(Based on information/documents obtained from bank(s) between 1996 and 1998)**

| Date | Bank | Cheque No. | Payee on Cheques | Payee in Books | Sum (RM) | Additional Info from source documents | Bank-in through |
|---|---|---|---|---|---|---|---|
| 24-5-96 | MBB | 049244 | Cash | Not found (un-recorded) | 25,000.00 | Dolley (A0302336) | MBB, Bangsar Baru (27-14123) |
| 13-12-96 | MBB | 111059 | Kaladolley Pereira | Pharmtrade | 10,000.00 | Bonus for 1995 – Acc 02-001-8563331 | BBMB, Jalan Ipoh, KL |
| 28-8-97 | PAB | 427577 | Kaladolley Pereira | Dolley | 5,000.00 | No information sighted | BBMB, P. Bandar Damansara W.P. (05-14039) |
| | | | | TOTAL | 40,000.00 | | |

A total of RM40,000, so it was submitted, was received by the 9th defendant from the funds of the plaintiff. No explanation was furnished by the 9th defendant as to why the sum of RM10,000 was allegedly paid to her as a bonus payment was recorded in the books of the plaintiff as being paid out to Pharmtrade. This was an act that fell clearly within the knowledge of the 9th defendant given the fact that she was responsible for the recording and keeping of the books and accounts of the plaintiff.

(g) All the payments as alluded to above were authorised and signed by the 9th defendant and they cannot be put down to any legitimate purpose of the plaintiff. The failure of the plaintiff to explain these payments, which were within the 9th defendant's direct knowledge, reinforced the plaintiff's contention that the 9th defendant dishonestly assisted the 1st defendant in breaching his fiduciary duties to the plaintiff.

(h) It seemed that the 9th defendant has always obstinately refused to co-operate with the receivers and managers, and the 9th defendant too failed to explain or justify why those payments were made. The averments at paras. 14 and 19 of the affidavit in reply of Kenneth Teh Ah Kiam that was affirmed on 25 September 2001 of encl. 22 merit reproduction:

> 14. I deny paragraph 15 of the 9th Defendant's Affidavit. The queries made by the R&M of the 9th Defendant were made as part of the genuine concern arising from the dissipation of assets of the Plaintiff, to which the 9th Defendant had knowingly participated. The 9th Defendant however has refused to co-operate with the Plaintiff and to explain all the payments made as referred to at paragraph 13 above.
>
> 19. I crave to refer to paragraph 21 of the 9th Defendant's Affidavit wherein the 9th Defendant seeks to adopt paragraphs 61 to 66 of the 5th Defendant's Affidavit in Reply and, in reply thereto, refer to paragraphs 29 to 34 of my Affidavit in Reply to the 5th Defendant's Affidavit. I further state that:
>
> 19.1 Paragraphs 61 to 66 of the 5th Defendant's Affidavit in Reply again consist wholly of bare averments and denials unsupported by any form of evidence or particulars;
>
> 19.2 The R&M had sought the assistance of the 9th Defendant to explain the nature of the substantial payments made to the various parties, including the 1st to 12th Defendants as set out at paragraph 11 of my 1st Affidavit but the 9th Defendant refused to co-operate with the R&M.

It is now ideal to refer to some authorities. For starters, it would be the case of *Ang Chee Huat v. Engelbach Thomas Joseph* [1995] 2 CLJ 893, CA Zakaria Yatim JCA (as he then was) writing a separate judgment aptly said:

> Having considered the evidence, I am of the view that the conduct of the appellant in this matter is lacking in probity and honesty. In the circumstances, I conclude that there is a real risk that the assets of the appellant will dissipate should the respondent succeed at the trial. I feel that I am justified in arriving at this conclusion in the light of the decisions in the following two cases: in *Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261; Peh Swee Chin J (as he then was) said at p. 264: The second condition laid down by Mustill J [in *Ninemia Maritime Corp v. Trave SGmbH & Co KG* [1984] 1 All ER 398], duly approved by the Federal Court [in *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62], was also satisfied, ie there was solid evidence that the probity of the defendant could not be relied on. The undisputed detention and use of the plaintiff's equipment, without the consent of plaintiff, and above all, the undisputed detention of 98% of progress payments No 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard

to the agreed retention sum with which the Mareva injunction was concerned; in other words, the defendant would, far more probably than not, dissipate the agreed retention sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.

His Lordship continued to say:

> In *Amixco Asia Pte Ltd v. Bank Negara Indonesia* 1946 [1992] 1 SLR 703, the Singapore Court of Appeal decided that there was overwhelming objective evidence of *prima facie* dishonest conduct on the part of Amixco/Kosen/Quek, and in the full circumstances of the case, a real risk of Amixco dissipating their assets to avoid satisfying BNI's judgment.
>
> I respectfully agree with the passage in Peh Swee Chin J's judgment quoted above and with the decision of the Singapore Court of Appeal in *Amixco*'s case. For the reasons stated above, I dismiss the appeal with costs.

Next, it would be the case of *Lee Sai Poh & Ors v. Vejayakumar & Anor* [1997] 3 SLR 612, a decision of the High Court of Singapore. That was a case where the court granted the mareva relief for the claim which involved the breach of fiduciary duty and conspiracy which in turn led to the tracing claim. The headnotes at p. 613 read as follows:

> (1) Where a Mareva injunction was granted, it could also operate as an injunction for the preservation of property pending trial if it was appropriate to do so. In this instance, it was appropriate to do so as the moneys were clearly identifiable and the claims of breach of fiduciary duty and conspiracy against the defendants and the tracing claim against the moneys in the Maybank account were genuine claims; *Choy Chee Keen Collin v. Public Utilities Board* [1997] 1 SLR 604 followed.
>
> (2) In the absence of any plausible explanation for the huge difference in the price of the tanker, the plaintiffs had on the facts a genuine case that there was a breach of fiduciary duty by the first defendant, that there was a conspiracy between the defendants against the third plaintiff and that the defendants held the moneys as constructive trustees for the third plaintiff.

This would be followed by the case of *S & F International Limited v. Trans-Con Engineering Sdn. Bhd.* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280, a decision of the Federal Court where the brilliant judge in the person of Abdoolcader FJ succinctly said:

> Mustill, J, held in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. & Co. K.G.* [1984] 1 All ER 398, on appeal to C.A. [1984] 1 All ER at p 413; [1983] 1 WLR 1412. that: (1) Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one

that the judge believes has got more than fifty per cent chance of success; (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, eg, that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice; (3) In reaching its conclusion, the court should take into account the defendant's evidence as well as the plaiantiff's. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case ([1983] 1 WLR 1412; [1984] 1 All ER at page 413) restated the principles of Mareva applications and held that the jurisdiction to grant Mareva injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, *inter alia*, to show, on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.

We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently: *Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142; *Hadmor Production Ltd. v. Hamilton* [1983] AC 191, 220; *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] 1 AC 130. These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR at p. 1421; [1984] 1 All ER at p. 418 where Kerr, LJ, in delivering the judgment of the court stated that recent decisions of the House have emphasised the importance of appellate courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.

Finally, it would be the case of *Third Chandris Shipping Corporation and Others v. Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] 2 All ER 972. In assessing the risk of dissipation, Lawton LJ said at p. 987 of the report:

What they have to do is to find out all they can about the party with whom they are dealing, including origins, business domicile, length of time in business, assets and the like; and they will probably be wary of the appearance of wealth which are not backed by known assets.

The sum total of it all would be this. That it was not necessary for the plaintiff to show actual evidence of risk of dissipation of the assets. The risk of dissipation would be something that must necessarily be inferred from the circumstances of the case including the circumstances wherein the funds in question were received by the parties concerned.

In regard to the issue of delay, it was argued that there was no delay on the part of the receivers and managers in commencing this action. And that even if there was a delay it had been validly explained in the plaintiff's affidavits in encls. 7 and 22. The explanations went like this. That when the receivers and managers took possession of the plaintiff, many of the records of the plaintiff prior to 1996 could not be located at the plaintiff's premises. The receivers and managers had to verify the information and entries contained in the books and accounting records of the plaintiff that were available then. Due to the lack of information and the numerous discrepancies in the records available, the receivers and managers had to conduct an examination of the financial affairs of the plaintiff for a period of three years prior to their appointment. The investigation was not smooth sailing. It was hampered by the failure of the directors of the plaintiff to co-operate with the receivers and managers and to hand over all the relevant accounts and documents. Information stored in computers belonging to the plaintiff had been deleted upon the appointment of the receivers and managers. A great deal of the information that was required was obtained from financial institutions and third parties. The responses from them were slow and sluggish and they were not co-operative at all. The plaintiff's former auditors too did not respond to the requests for information that were made. Numerous letters written to various third parties requesting for underlying information and documents, particularly in relation to the purported transactions entered into with the plaintiff, can be seen in exh. "KT-3" of encl. 7 and they are too voluminous to be reproduced here. And, so, based on these reasons the delay on the part of the receivers and managers in instituting these proceedings were certainly justifiable given the circumstances of the present case. In any event, the conduct of the 9th defendant and the fact that she clearly received large sums of money from the plaintiff for which there was no justification precluded the 9th defendant from attempting to defeat the application in encl. 6 on the ground of delay.

Incidentally, delay is one of the factors that this court can take into account in exercising its discretion whether to grant an interlocutory injunction. But delay *ipso facto* is not a ground for defeating any such application. In this context, reference to the case of *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 should be made. There Edgar Joseph Jr. J (as he then was) categorically stated, in relation to the effect of delay on interlocutory proceedings, that:

It is settled law that delay on the part of the plaintiff in seeking an interlocutory injunction `may be calculated to throw considerable doubt upon the reality of his alleged injury' (per Lord Chelmsford LC in *Ware v. Regent's Canal Co* [1858] 44 ER 1250 at p 1257) and hence may be of importance when the balance of convenience is being determined. But much will depend upon the particular circumstances of each case. In other words, the delay is often explicable by reference to other circumstances; for example, a plaintiff might have delayed the institution of proceedings because he wished to obtain better means of providing his case (see *Coles v. Sims* [1854] 43 ER 768 at p 771). It follows, therefore, that delay on the part of a plaintiff, although it may give rise to an inference that he has not suffered hardship or prejudice, such inference is easily open to rebuttal by direct evidence of the particular circumstances.

Applying the authorities cited to the case now before me, I found as a fact, that such delay as there was had been satisfactorily explained by counsel for the plaintiff and I need say nothing more about the point.

Likewise here, nothing further should be said about the delay.

It was the stand of the plaintiff that the 9th defendant was not entitled to the sum of RM40,000 received by her from the plaintiff. This sum rightly belongs to the plaintiff and that no hardship could possibly be caused to the 9th defendant in the event that a mareva injunction was issued by this court.

The plaintiff has succeeded in showing that the 9th defendant had received the sum of RM40,000. This cannot be disputed. The onus was thus on the 9th defendant to legitimately justify her right to retain the said sum which she was not, in the first place, entitled to. The fact that substantial payments were co-signed and authorised by the 9th defendant when there was no legitimate basis for the same was in itself clear evidence of dishonesty on the part of the 9th defendant. As the finance and administration manager of the plaintiff, the 9th defendant could have opted to co-operate with the receivers and managers and to assist in explaining such payments. But alas, she chose not to. She refused to cooperate with the receivers and managers.

The sum total of it all would be this. That there is a very strong *prima facie* case in support of the plaintiff's claim herein. The circumstances wherein the 9th defendant, who was the finance and administration manager of the plaintiff, had received monies belonging to the plaintiff which were recorded in the books of the plaintiff as being made to another party and which cannot be related to any underlying transaction or legitimate purpose, coupled with the refusal of the 9th defendant to explain any of the payments authorised or co-signed by her and, bearing in mind, the corporate structures of the 2nd, 3rd

and 4th defendants – all these when taken cumulatively would provide solid evidence to infer a very serious risk of dissipation of any assets that were and are still in the hands of these defendants.

**The 14th Defendant**

The plaintiff's claim against the 14th defendant may be stated in this way. The 14th defendant received monies belonging to the plaintiff. These monies were paid out of the funds of the plaintiff in breach of the 1st defendant's fiduciary duties owed by him to the plaintiff. The 14th defendant received large sums of money belonging to the plaintiff for which:

(1) he gave no consideration;

(2) and to which he was not entitled to; and

(3) which, in equity, he was obliged to return and must return.

The 14th defendant received the following sums of money (see exhibit "KT-5" of enclosure 7 at page 374 to page 376 – especially at page 374 thereto):

**PHARMMALAYSIA BERHAD**
**(Receivers and Managers Appointed)**

**Cash cheques encashed by Balaguru A/L Thiagarajah**
**(Based on information/documents obtained from bank(s) between 1966 and 1998)**

| Date | Bank | Cheque No. | Payee on Cheques | Payee in Books | Sum (RM) | Additional Info from source documents | Bank-in through |
|---|---|---|---|---|---|---|---|
| 17-1-96 | MBB | 000329 | Cash | Pharmtrade | 50,000.00 | Balaguru a/l Thiagarajah (0975812) | MBB, Bangsar Baru (27-14123) |
| 25-1-96 | MBB | 010276 | Cash | Pharmtrade | 50,000.00 | Balaguru a/l Thiagarajah (0975812) | MBB, Bangsar Baru (27-14123) |
| 10-2-96 | MBB | 010298 | Cash | Meadow Quest | 50,000.00 | Balaguru a/l Thiagarajah (0975812) | MBB, Bangsar Baru (27-14123) |
| | | | | TOTAL | 150,000.00 | | |

and he should make restitution thereto. But the 14th defendant was quite adamant. He said that he never came into contact with the plaintiff. He too said that he did not know the 1st defendant and that he was not engaged in any fiduciary transaction with the plaintiff nor did he assist the 1st defendant to breach his fiduciary duties owed to the plaintiff. But, with respect, all these issues raised by the 14th defendant were wholly irrelevant to the 14th defendant's liability to return the sums of money received by the 14th defendant to the plaintiff. The 14th defendant seemed to be bewildered because he failed to comprehend the cause of action against him. The cause of action against the 14th defendant was not for breach of trust or knowingly assisting the 1st defendant to breach his fiduciary obligations to the plaintiff in any manner but rather for the return of the monies received by the 14th defendant which belonged to the plaintiff which were paid out from the plaintiff in breach of trust and fiduciary duty and which the 14th defendant was not lawfully entitled to receive or retain. Whether or not the 14th defendant was a party to such a breach of fiduciary duty was not an issue here. Paragraph 5 of encl. 7 which was reproduced earlier categorically stated the cause of action against the 14th defendant as well as against the 13th defendant "as volunteers who received money in breach of trust and who are obliged, not having given valuable consideration in respect thereof, to make restitution of the sums received". It must be recalled that the plaintiff was not proceeding against the 13th defendant. Be that as it may, para. 7 of encl. 7 was worded in this way and they are quite pertinent:

> 7. After the long and complex investigation, now the R&M have managed to put together the information and documents unearthed by their investigation. What emerges is that the 1st Defendant caused, permitted or procured the Plaintiff to effect various payments, which were neither in the ordinary course of business of the Plaintiff nor referable to or justified by any legitimate purpose. The payments were made to 1st Defendant and/or to the 2nd to 14th Defendants. The 2nd to 12th Defendants dishonestly assisted the 1st Defendant in breaching fiduciary duties owed to the Plaintiff in connection with such payments, and/or knowingly received monies paid out in breach of such duties. I verily believe that as a result of the actions of the Defendants, the Plaintiff suffered substantial financial loss. This claim is intended to:

(a) seek equitable compensation and restitution from the 1st Defendant; and

(b) to hold the 2nd to 12th Defendants accountable as constructive trustees in favour of the Plaintiff; and

(c) to compel the 13th and 14th Defendants as volunteers with no right to retain sums received as against the Plaintiff to make restitution of the same.

The purpose of this application is to seek Mareva injunctive relief from this Honourable Court to preserve assets of the Defendants that might otherwise be dissipated or removed out of the jurisdiction and also an Anton Piller Order to preserve documents and other information and materials in the possession of the 1st and 5th to 14th Defendants of which there is a real possibility that the same may be destroyed or concealed once the relevant Defendants have notice of these proceedings.

Again the words employed at para. 7(c) of encl. 7 were like this:

to compel the 13th and 14th defendants as volunteers with no right to retain sums received as against the plaintiff to make restitution of the same.

The amended statement of claim at p. 17 of encl. 13 at para. "C" merits reproduction. It was worded like this:

C. As against the 13th and 14th Defendants:

(i) A declaration that the 13th and/or 14th Defendants are liable to make restitution of all sums received by each of them from the Plaintiff that were made in breach of the 1st Defendant's fiduciary duties owed to the Plaintiff.

(ii) An account and inquiry as to all funds of the Plaintiff reeived by or paid on account of the 13th and /or 14th Defendants and each of them, and for such tracing orders as may be necessary in aid thereof.

I was not concerned with the 13th defendant as the plaintiff was not interested in him.

The fact of the matter was this. That the 14th defendant had received those sums of money without consideration and as a mere volunteer and he must make restitution of those sums forthwith.

Not to be outwitted, the 14th defendant contended that he cashed those cheques from the plaintiff amounting to RM150,000 for Ermelinde Ellamazaroo Mahendra ("E.E. Mahendra") was certainly incredible and wholly unsupportable. The 14th defendant argued that the cash cheques cashed by him

were cashed on behalf of E.E. Mahendra who was his friend as he could not find a parking space in Bangsar. These payments were allegedly for tax consultancy work done by E.E. Mahendra for the plaintiff. The stand of the plaintiff was quite simple. The plaintiff has no knowledge of such work done by E.E. Mahendra. No evidence of any such work done by E.E. Mahendra has been adduced by the 14th defendant. The 14th defendant too wholly failed to explain the fact that the 14th defendant had cashed the cheques. To say the least it was simply incredible to believe that on three separate occasions the 14th defendant accompanied E.E. Mahendra to cash cheques because of the difficulty in finding parking space at Bangsar. Again at p. 242 of exh. "KT-4" of encl. 7 there is a cheque dated 11 January 1996 from Malayan Banking Berhad, Bangsar Baru, Kuala Lumpur bearing number 000305 for a sum of RM50,000 and this was cashed by the 14th defendant and it was also unaccounted for. The issue of whether or not E.E. Mahendra was a party to these proceedings was totally irrelevant to the 14th defendant's liability to make restitution of the sums belonging to the plaintiff which were received by the 14th defendant. At any rate, no evidence of any such work done by E.E. Mahendra was adduced by the 14th defendant. No evidence too was adduced by the 14th defendant that he had cashed the cheques for E.E. Mahendra and that he had given the proceeds of the cheques to E.E. Mahendra. Of pertinence would be this. That no evidence has been adduced from E.E. Mahendra to corroborate the contention that the 14th defendant had cashed the cheques for him. It was incredible that on three separate occasions, the 14th defendant followed E.E. Mahendra to cash the cheques because of the difficulty in finding parking space at Bangsar. The affidavit in reply of Kenneth Teh Ah Kiam that was affirmed on 22 October 2001 as seen at encl. 34 should be referred to. There at para. 7 of encl. 34 it was deposed as follows:

> 7. I now crave to refer to paragraph 7 of Balaguru's Affidavit.
>
> 7.1 I reiterate pages 374 to 376 of Exhibit 'KT-5' of my 1st Affidavit wherein I have set out the various cash cheques that were encashed by the 14th Defendant;
>
> 7.2 The fact is that the 14th Defendant clearly received sums of money from the Plaintiff to which he was not lawfully entitled and which he is entitled to return;
>
> 7.3 I have no knowledge of the said Ermelinde Ellamazaroo Mahendra ('E.E. Mahendra') and deny that any tax consultancy or any other services or work was done by her to or for the benefit of the Plaintiff. I therefore deny that any sums were due and owing to her from the Plaintiff. In any event, there is absolutely no evidence of any such alleged work done adduced by the 14th Defendant.

7.4 I am somewhat surprised that the 14th Defendant can allege that on three consecutive and separate occasions, he accompanied E.E. Mahendra to encash cheques set out at pages 374 to 376 of Exhibit 'KT-5' simply because of difficulty in finding car parking space. I verily believe that this allegation is wholly insufficient to rebut the fact that the 14th Defendant encashed and took physical possession of the proceeds of the three cheques from the Plaintiff.

7.5 I also crave to refer to page 242 and Exhibit 'KT-4' of my 1st Affidavit wherein there is set out another cheque for the sum of RM 50,000.00 which appears to have been encashed by the 14th Defendant.

Thus far, the plaintiff has adduced evidence to the effect that the cheques in question were cashed by the 14th defendant. This was beyond doubt and it was undisputed. The evidential burden shifted to the 14th defendant and it was for him to show that he did not physically receive the proceeds of the cheques. To date, the 14th defendant has failed to discharge the onus that has been shifted to him. In my judgment, the mere bare and uncorroborated allegation that the 14th defendant assisted E.E. Mahendra was not sufficient.

The decision of *Belmont Finance Corporation v. Williams Furniture Ltd and Others (No 2) (supra)* was misconstrued by the 14th defendant. Even as a stranger, the 14th defendant can be held liable as a constructive trustee so long as he received moneys paid out in breach of trust. *Belmont Finance (supra)* made this abundantly clear – particularly the judgment of Buckley LJ at p. 405 between line 'b' to line "c" and between line 'd' to line "e" as reproduced earlier. A stranger to a trust can be held liable in equity as constructive trustee in two separate situations. One situation is for "knowing receipt", while the other is for "knowing assistance" of a breach of trust (*Industrial Concrete Products Berhad v. Concrete Engineering Products Berhad & Other Suits* [2001] 8 CLJ 262). The plaintiff's claim against the 14th defendant is for knowing receipt of trust funds and not for knowingly assisting the 1st defendant to commit a breach of trust. It is clear as crystal that the 14th defendant received moneys of the plaintiff which were misapplied. As I said the 14th defendant gave no consideration for these funds. The 14th defendant ought to have known that he had no right to retain the sums of money and he too, as an advocate and solicitor, should know that he would be liable as a constructive trustee. The learned judge in the case of *Industrial Concrete Products Berhad v. Concrete Engineering Products Berhad (supra)* sets out the law in this fashion (see p. 292 of the report) and it would surely apply to the 14th defendant at hand:

This claim for breach of constructive trusteeship has its origins from the much-quoted dictum of Lord Selbourne LC in the case of *Barnes v. Andy* [1874] LR 9 Ch App 244 which declares:

> That responsibility (of a trustee) may no doubt be extended in equity to others who are not properly trustees, if they are found actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps the court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

Arising from this, two situations where third parties may become liable in equity are apparent. The first is commonly known as 'knowing receipt' as distinct from the second where liability arises from 'knowing assistance'. The difference is best explained by Lord Nicholls of Birkenhead in the Privy Council case of *Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming* [1995] 3 MLJ 74 at p 77 as:

> Stated even more shortly, the first limb of Lord Selbourne LC's formulation is concerned with the liability of a person as a recipient of trust property or its traceable proceeds. The second limb is concerned with what, for want of better compendious description, can be called the liability of an accessory to a trustee's breach of trust. Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of a secondary liability in the sense that it only arises where there has been a breach of trust.

It was not open to the 14th defendant to argue that the decision in *Belmont Finance* was only peculiar to English law. The above mentioned passage from the *Industrial Concrete Products Berhad (supra)* brought into sharp focus the case of *Barnes v. Andy* [1874] LR 9 Ch App 244 and the decision of the Privy Council in the case of *Royal Brunei Airlines Sdn. Bhd. v. Philip Tan Kok Ming (supra)* which distinguished between "liability for knowing receipt" and "liability for knowing assistance". Since the cause of action against the 14th defendant was grounded on his "liability for knowing receipt", his arguments that he did not misappropriate the funds of the plaintiff or that he had not acted fraudulently were certainly misconceived.

With respect, it would appear that the 14th defendant has confused liability for knowing receipt with that of knowing assistance. In *Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors* [1999] 5 MLJ 421, 438, the learned judge applied the speech of Yusof Abdul Rashid J (as he then was) in the case of *Lian Keow Sdn Bhd v. Chelliah Paramjothy & Anor* [1988] 1 CLJ 57, 58; [1988] 1 CLJ (Rep) 729 and this was what Yusof Abdul Rashid J (as he then was) said:

> As the instant case is a case in equity founded on breach of trust, it is trite law that in equity a person who receives trust property takes it subject to the trust if he has actual or constructive notice of the trust interest and that a person who receives trust property which he knows or ought to know is inconsistent with the terms of the trust, is accountable to the beneficiary under that trust. A stranger may be held liable to the beneficiary of a trust if he dishonestly allows himself to be used as an instrument of a breach of trust.

This passage was uttered by Yusof Abdul Rashid J in the context of liability for both "knowing receipt" and "knowing assistance". It seems that liability for knowing receipt accrues when the recipient has constructive notice and when the recipient "receives trust property" … "which he knows or ought to know is inconsistent with the terms of the trust". Vinelott J in the case of *Eagle Trust plc v. Securities Ltd* [1992] 4 All ER 488, 509, aptly said that a stranger who is a recipient may also be deemed to be a constructive trustee "if the circumstances are such that an honest and reasonable man would have inferred that the moneys were probably trust moneys and were being misapplied". I must reiterate that the 14th defendant knew or ought to have known that he was not lawfully entitled to receive the moneys cashed by him. Having given no consideration whatsoever for the sums received by him, and bearing in mind the prevailing circumstances one can readily surmise that an honest and a reasonable man would have inferred that the moneys received by the 14th defendant were probably trust moneys and were being misapplied. The 14th defendant is an advocate and solicitor and that makes him all the more culpable.

Of crucial importance was this. There was no evidence forthcoming from the 14th defendant to show that E.E. Mahendra had acknowledged receipt of the proceeds of those cheques from the 14th defendant. This was the damning feature of the 14th defendant's culpability.

The liability of the 14th defendant to make restitution arises out of the fact that the 14th defendant by his continued retention of the moneys has been unjustly enriched at the expense of the plaintiff. Liability for such unjust enrichment under the law of restitution exists irrespective of any form of

knowledge that may be imputed on the part of the 14th defendant. There is a recent decision of the House of Lords with a coram of Lord Slynn of Hadley, Lord Steyn, Lord Hoffmann, Lord Hutton and Lord Millett in the case of *Twinsectra Ltd v. Yardley and Others* [2002] 2 All ER 377 that should be referred to. There, writing a separate judgment, Lord Millett at p. 404 and at para. 105 aptly said:

> [105] Liability for 'knowing receipt' is receipt-based. It does not depend on fault. The cause of action is restitutionary and is available only where the defendant received or applied the money in breach of trust for his own use and benefit (see *Agip (Africa) Ltd v. Jackson* [1992] 4 All ER 385 at 403-404, [1990] Ch 265 at 291-292, *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 3 All ER 97 at 103, [1995] 2 AC 378 at 386). There is no basis for requiring actual knowledge of the breach of trust, let alone dishonesty, as a condition of liability. Constructive notice is sufficient, and may not even be necessary. There is powerful academic support for the proposition that the liability of the recipient is the same as in other cases of restitution, that is to say strict but subject to a change of position defence.

The fact of the matter was this. That the 14th defendant received monies belonging to the plaintiff which came into his hands in breach of trust. The onus was on the 14th defendant to prove that there was some lawful justification for the receipt of those moneys or that those moneys were actually received by E.E. Mahendra and not by him. Sadly, the 14th defendant has not adduced such evidence to this effect and, consequently, he must be held liable to account for those moneys. There was no affidavit from E.E. Mahendra to show that it was he and not the 14th defendant who had received those moneys. Indeed if as what the 14th defendant has said that E.E. Mahendra was his close friend then surely E.E. Mahendra should come forward to corroborate the 14th defendant's version. This was not forthcoming. In the absence of such evidence, the averments raised by the 14th defendant were untenable.

The 14th defendant argued that the plaintiff has not produced an iota of evidence to show that there was a risk that the 14th defendant would flee the jurisdiction. It was pointed out that if there was any idea of the 14th defendant fleeing the jurisdiction he could have done so some 2 years ago. It was submitted that it was audacious on the part of the plaintiff to demand for the delivery of the 14th defendant's passport as it would be tantamount to infringing and interfering with the personal liberties of the 14th defendant bearing in mind that the 14th defendant is an advocate and solicitor and the said liberties are said to be sacrosanct to him. By way of a rebuttal, the plaintiff reiterated that it has adduced clear and undisputed evidence of receipt by the 14th defendant of monies belonging to the plaintiff. The onus was now

on the 14th defendant to justify how and why those moneys came to his hands and what he did with them. According to the plaintiff, the explanations by the 14th defendant amounted to nothing more than mere allegations only and that they were wholly unsubstantiated by any evidence from E.E. Mahendra or from any other source. The principles relating to the grant of a mareva injunction as enunciated in *Bank Bumiputra Malaysia Bhd and Anor v. Lorrain Osman & Ors (supra)* as alluded to earlier does not require the plaintiff to show, in an application for a mareva injunction, that there is solid evidence of the risk of dissipation of assets. What must be shown by the plaintiff is that (i) there is a good arguable case, (ii) that the 14th defendant has assets within jurisdiction, and (iii) that there is a risk that these assets will be dissipated or removed from the reach of the plaintiff before any such judgment is satisfied. Suffice for me to say that the 14th defendant's contention that there must be "solid evidence" of dissipation does not represent an accurate statement of the law. What the plaintiff must show is that there is a risk of dissipation of assets. As illustrated by the plaintiff and as alluded to earlier, I must hold that the plaintiff has shown a good arguable case *vis a vis* the liability of the 14th defendant to return the monies received by him. And that the issues of whether the 14th defendant had any association with the plaintiff or even with the 1st defendant would be entirely irrelevant for purposes of assessing the issue of liability of the 14th defendant as a stranger.

The plaintiff highlighted three cheques to show that the 14th defendant had received the moneys in question. And all these can be seen at exh. "KT-5" of encl. 7 at p. 374 to p. 376 thereof. At p. 374, the cash cheque was from Malayan Banking Berhad, Bangsar Baru, Kuala Lumpur bearing cheque number 000329 dated 17 January 1996 for the sum of RM50,000. At p. 375, the cash cheque was from Malayan Banking Berhad, Bangsar Baru, Kuala Lumpur bearing cheque number 010276 dated 25 January 1996 for the sum of RM50,000. At p. 376, the cash cheque was from Malayan Banking Berhad, Bangsar Baru, Kuala Lumpur bearing cheque number 010298 dated 10 February 1996 for the sum of RM50,000. The recipient of these three cash cheques was none other than the 14th defendant – Balaguru a/l Thiagarajah.

The 14th defendant drew my attention to encl. 7 particularly at p. 239 where under the first column the following legend appeared:

Date: 05.01.96
Bank: MBB
Cheque no: 993835
Payee on cheque: cash
Payee in books: not found (unrecorded)
Sum (RM): RM50,000.00
Additional information
from source documents: Emmelinda I.C. 4877097
Bank in through: MBB, Bangsar Baru 27-14123.

And using this piece of information as a leverage, the 14th defendant argued that "Emmelinda" referred to none other than E.E. Mahendra and yet, it was submitted that, the plaintiff chose to ignore this fact by merely stating that it was irrelevant to the 14th defendant. It was submitted that the plaintiff was embarking on selective prosecution thereby showing bad faith. It was submitted that if E.E. Mahendra had been included as a party to these proceedings, the 14th defendant was confident that he could prove his case. It was further submitted that for reasons best known to the plaintiff, the latter had circumvented the issue by delving in an exercise of futility. Indeed if there was E.E. Mahendra, the best way for the 14th defendant to clear his name would be to cause E.E. Mahendra to affirm an affidavit and say that those three cash cheques were meant for him and not for the 14th defendant. This can easily be done because according to the 14th defendant E.E. Mahendra was his friend. At any rate, the three cash cheques would be those case cheques bearing numbers 000329, 010276 and 010298. And as I said earlier, there was another cash cheque number 000305 for the sum of RM50,000 as seen at exh. "KT-4" of encl. 7 and this cash cheque was also cashed by the 14th defendant and it remained unaccounted for. The total sum cashed by the 14th defendant came up to RM200,000 and not RM150,000.

The risk of dissipation of assets by the 14th defendant are real and it cannot be taken lightly. The 14th defendant clearly received those moneys to which he was clearly not entitled to and for which he furnished no satisfactory explanation. As an advocate and solicitor, the 14th defendant should have been all the more aware of the circumstances in which he received those moneys and the probability that those sums related to funds that were being misapplied. The 14th defendant gave no consideration for all those sums and, in the circumstances, it was incredible to imagine that he was not suspicious of the circumstances of his receipt.

## Conclusion

I have endeavoured to set out in great detail the facts, the law and the arguments of the parties to these proceedings. No stones were left unturned. The very nature of the defendants' dishonest network and the substantial sums involved made it highly probable that the defendants will seek to dissipate the substantial sums received from the plaintiff and destroy or conceal any evidence of such payments if the plaintiff's application in encl. 6 was not granted by this court. The risk of dissipation of the assets would be sufficient for this court to act according to the principles as enunciated in the case of *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Osman & Ors (supra).*

For the reasons as adumbrated above, I granted an order in terms of paras. 8 to 18 of encl. 6 as against the 2nd to the 6th defendants as well as the 9th defendant and the 14th defendant. I too ordered that there ought to be liberty to apply. Enclosures 74 and 84 were fixed for mention on 29 April 2004. The learned counsel for the 5th defendant requested orally for a stay to be granted. I declined and, instead, I requested him to file a formal application for a stay.